93-1631

In the Supreme Court of the United States

OCTOBER TERM, 1993

LLOYD BENTSEN, SECRETARY OF THE TREASURY, ET AL., PETITIONERS

v.

ADOLPH COORS COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Section 5(e)(2) of the Federal Alcohol Administration Act, 27 U.S.C. 205(e)(2), prohibits statements of alcohol content on the labels of malt-beverage containers unless such statements are required by state law. The question presented is whether that prohibition violates the First Amendment.

PARTIES TO THE PROCEEDING

Petitioners, the defendants below, are the Secretary of the Treasury and the Director of the Bureau of Alcohol, Tobacco and Firearms within the Department of the Treasury. Respondent, the plaintiff below, is the Adolph Coors Company. Also participating in the proceedings below were the Speaker and Bipartisan Leadership Group of the United States House of Representatives, which initially participated as defendants-intervenors but later withdrew from the case.

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The Solicitor General, on behalf of the Secretary of the Treasury, et al., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-9a) is reported at 2 F.3d 355. The prior opinion of the court of appeals (App., *infra*, 10a-31a) is reported at 944 F.2d 1543.

JURISDICTION

The judgment of the court of appeals was entered on August 23, 1993. A petition for rehearing was denied on December 1, 1993. App., *infra*, 55a-56a. On February 22,

1994, Justice Ginsburg extended the time for filing a petition for a writ of certiorari to and including March 31, 1994. On March 22, 1994, Justice Ginsburg further extended the time for filing a certiorari petition to and including April 15, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part: "Congress shall make no law * * * abridging the freedom of speech."

Section 5 of the Federal Alcohol Administration Act (FAAA), 27 U.S.C. 205, is reproduced at App., *infra*, 57a-65a.

Section 7 of the FAAA, 27 U.S.C. 207, provides in pertinent part:

> Any person violating any of the provisions of section * * * 205 of this title shall be guilty of a misdemeanor and upon conviction thereof be fined not more than $1,000 for each offense.

The relevant portions of 27 C.F.R. 7.26, 7.29, and 7.54 are reproduced at App., *infra*, 66a-72a.

STATEMENT

This case concerns the constitutionality of Section 5(e)(2) of the Federal Alcohol Administration Act (FAAA or Act), which prohibits the disclosure of statements of alcohol content on the labels of malt beverages. 27 U.S.C. 205(e)(2). Congress enacted the labeling prohibition to curb "strength wars" among brewers of malt beverages that arose in the wake of the repeal of Prohibition. The Tenth Circuit held that the labeling restriction in Section 205(e)(2) violates the First Amendment. We seek review of

that holding, which not only strikes down an Act of Congress the validity of which has been assumed for almost 60 years, but also casts serious doubt on the constitutionality of similar labeling restrictions that have been adopted by the majority of the States.

1. a. The FAAA, 27 U.S.C. 201 *et seq.*, was enacted "[i]n order effectively to regulate interstate and foreign commerce in distilled spirits, wine, and malt beverages, to enforce the twenty-first amendment, and to protect the revenue and enforce the postal laws with respect to distilled spirits, wine, and malt beverages." 27 U.S.C. 203; see also *Continental Distilling Corp.* v. *Shultz*, 472 F.2d 1367, 1369-1370 (D.C. Cir. 1972); *William Jameson & Co.* v. *Morgenthau*, 25 F. Supp. 771, 774 (D.D.C. 1938) (three-judge court), vacated for lack of substantial federal question, 307 U.S. 171 (1939) (per curiam). To carry out those purposes, Sections 3 and 4 of the Act require certain participants in the alcoholic beverage industry (not including brewers) to obtain a permit from the Secretary of the Treasury. 27 U.S.C. 203, 204. In addition, Section 5 of the Act, 27 U.S.C. 205, proscribes certain types of "[u]nfair competition" and "unlawful practices."[1]

This case involves a challenge to the portions of Section 205(e) and Section 205(f) that prohibit statements of the alcohol content of malt beverages.[2] Section 205(e) requires

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[1] Neither the FAAA nor any other federal statute regulates the amount of alcohol that malt beverages may contain. That matter has been left to the States, consistent with the long "history of state regulation of alcoholic beverages" and Congress's solicitude for the States' broad discretion in this area. See *Craig* v. *Boren*, 429 U.S. 190, 205-206 (1976); see also *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 107 n.10 (1980). In turn, many States restrict the alcohol content of malt beverages. See Defendants' Exhibit (DX) DA (at 272-273 (survey of state laws)).

[2] The term "malt beverage" is defined by statute (27 U.S.C. 211(a)(7)) and regulation (27 C.F.R. 7.10) as

the containers of alcoholic beverages to be labeled

> in conformity with such regulations * * * [of the Secretary] (2) as will provide the consumer with adequate information as to the identity and quality of the products [and] the alcoholic content thereof (except that statements of, or statements likely to be considered as statements of, alcoholic content of malt beverages are prohibited unless required by State law * * *).

Section 205(f) requires print and broadcast advertisements for alcoholic beverages to be

> in conformity with such regulations * * * [of the Secretary] (2) as will provide the consumer with adequate information as to the identity and quality of the products advertised [and] the alcoholic content thereof (except the [*sic*] statements of, or statements likely to be considered as statements of, alcoholic content of malt beverages and wines are prohibited).

Both Sections 205(e) and 205(f), however, are designed to operate in a manner consistent with state laws governing

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> [a] beverage made by the alcoholic fermentation of an infusion or decoction, or combination of both, in potable brewing water, or malted barley with hops, or their parts, or their products, and with or without other malted cereals, and with or without the addition of unmalted or prepared cereals, other carbohydrates or products prepared therefrom, and with or without the addition of carbon dioxide, and with or without other wholesome products suitable for human food consumption.

Thus, "malt beverage" encompasses all types of beer. For purposes of this case, it is important to distinguish the terms "malt beverage" and "malt liquor." While the term "malt beverage" includes "malt liquor," the latter term is not defined by the FAAA or regulations; rather, it is used in the industry to refer to the type of beer with the highest alcohol content. See App., *infra*, 7a n.4; C.A. App. 172.

wholly intrastate commerce in malt beverages.[3]

Implementing regulations prohibit the disclosure of alcohol content on beer labels, except where disclosure is required by state law (27 C.F.R. 7.26(a), 7.29(g)), and they similarly prohibit the disclosure of alcohol content in print and broadcast beer advertising (27 C.F.R. 7.54(c)). The prohibitions cover both numerical designations of alcohol content and descriptive terms suggestive of high alcohol content, such as " 'strong,' 'full strength,' 'extra strength,' 'high test,' 'high proof,' [and] 'full alcohol strength.' " 27 C.F.R. 7.54(c); see also 27 C.F.R. 7.29(f), (g). The prohibitions do not, however, preclude beer labels or other advertisements that identify a beer as "low" or "reduced" alcohol, "non-alcoholic," or "alcohol-free," in accordance with the Secretary's definition of those terms. 27 C.F.R. 7.26(b)-(d); see also 27 C.F.R. 7.29(f), 7.54(c). See p. 23, *infra*. The labeling prohibition is enforced by regulations requiring the bottlers of malt beverages to obtain certifi-

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[3] The penultimate paragraph of Section 205(f) provides in pertinent part:

> In the case of malt beverages, the provisions of this subsection and subsection (e) of this section shall apply to the labeling of malt beverages sold or shipped or delivered for shipment or otherwise introduced into or received in any State from any place outside thereof, or the advertising of malt beverages intended to be sold or shipped or delivered for shipment or otherwise introduced into or received in any State from any place outside thereof, only to the extent that the law of such State imposes similar requirements with respect to the labeling or advertising, as the case may be, of malt beverages not sold or shipped or delivered for shipment or otherwise introduced into or received in such State from any place outside thereof.

See also 27 C.F.R. 7.20(a), 7.50.

cates of label approval from the Secretary. 27 C.F.R. 7.40-7.42; see also 27 U.S.C. 205(e).

b. Congress included restrictions in the FAAA on the disclosure of alcohol content in beer labeling and other advertising in order to curb "strength wars" among brewers that arose in the wake of the repeal of Prohibition by the Twenty-first Amendment. The FAAA replaced interim regulations under a voluntary code system that had been developed under the National Industrial Recovery Act and approved by the President for use after the repeal of Prohibition, pending the enactment of federal legislation addressing problems in the alcoholic beverage industry that could not adequately be addressed by the States.[4] According to the committee reports on the bills that became the FAAA, the statute "[i]n general * * * incorporates the greater part of the system * * * enforced by the Government under the codes." H.R. Rep. No. 1542, 74th Cong., 1st Sess. 4 (1935); S. Rep. No. 1215, 74th Cong., 1st Sess. 3 (1935). The Tenth Circuit accordingly recognized in its first decision in this case that the history of the regulations adopted under the code system is relevant to interpretation of the Act. App., *infra,* 17a n.4.

The regulations initially proposed by the Federal Alcohol Control Administration (FACA) did not prohibit statements of alcohol content in beer labeling or advertising. *Hearing Before the FACA With Reference to Proposed Regulations Relative to the Labeling of Products of the Brewing Industry* (Nov. 1, 1934) (*FACA Hearing*), Clerk's Record (CR) 15, at 3-4. Instead, the proposed regulations prohibited only descriptive statements such as " 'full strength', 'extra strength', 'high test', 'high proof', [and] 'prewar proof'." *Id.* at 3. At the hearing on the proposed regulations, however, witnesses unanimously supported a broader prohibition that would bar even seemingly objective numerical designations of alcohol content. For example, the first witness at the hearing, George McCabe, counsel to the Brewers Code Authority, stated (*id.* at 7):

> We would like a regulation of the F.A.C.A. which would outlaw any declaration of alcoholic content on labels for fermented malt liquors except in States where such a requirement is made by the State law. * * * [T]he alcoholic declaration has been productive of more deception than any one part of the label. Some brewers went haywire * * * and were trying to sell their beer on an alcohol basis, and they resorted, as you all know, to the use of all sorts of numbers and figures, numerals, to convey the impression that the beer contained an excessive amount of alcohol, which it did not contain.

Mr. McCabe then read a letter from a major brewer, which he described as "fairly expressive of the general sentiment of the industry," recommending that "all reference to alcoholic content * * * be eliminated from labeling [and] advertising," in light of the "trouble with this sort of thing during the past 18 months." *Id.* at 8. Other witnesses explained that, although "the legitimate brewer does not desire to sell his beer on the basis of alcohol," but rather "as a food product" (*id.* at 25), some brewers "seem[ed] to be of the opinion that to sell beer they should sell the

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[4] As discussed in the legislative history of the FAAA, the adoption of the Twenty-first Amendment "took place with unexpected speed." H.R. Rep. No. 1542, 74th Cong., 1st Sess. 3 (1935). The Amendment was proposed to the legislatures of the States by the Seventy-second Congress on February 20, 1933, and was ratified by the requisite number of States less than ten months later, on December 5, 1933. See *ibid.*; 76 Cong. Rec. 4565 (1933). Because Congress was not in session at that time, the President approved temporary regulation of the alcoholic beverage industry under the voluntary code system in order to fill the perceived regulatory vacuum. H.R. Rep. No. 1542, *supra,* at 3-4.

public alcohol" (*id.* at 29). The latter brewers' practice of disclosing alcohol content led "legitimate" brewers to conclude that "in order to meet competition it was necessary to increase the alcoholic content of the[ir] beer." *Id.* at 59. The witnesses predicted that a prohibition on statements of alcohol content would "get * * * beer back to a low alcoholic content." *Id.* at 73; see also *id.* at 33 ("if you just write the alcoholic content off the label, you are going to have a lower alcoholic content beer than you are if you require the alcoholic content to be stated on the label").

The House committee report on the bill that became the FAAA expressed the judgment that "[m]alt beverages should not be sold on the basis of alcohol content." H.R. Rep. No. 1542, *supra,* at 12. The report explained that "attempts to sell beer and other malt beverages on the basis of alcoholic content are attempts to take advantage of the ignorance of the consumer and of the psychology created by prohibition experiences." *Ibid.* The report found that "[l]egitimate members of the industry have suffered seriously from unfair competition resulting from labeling and advertising" that states alcohol content. *Ibid.* The report also found that "irrespective of th[e] falsity" of such statements, "their abuse has grown to such an extent since repeal that the prohibition of all such statements is in the interest of the consumer and the promotion of fair competition." *Id.* at 12-13. More broadly, the report found, based on "[e]xperience prior to prohibition," that the States "could not alone" protect their citizens from "unscrupulous advertising" and "deceptive labeling practices," due to "the diversity of their laws and the fact that practically all alcoholic beverage producers and large-scale distributors did an interstate business." *Id.* at 2-3.[5]

[5] The Senate report similarly found that abusive "labeling or advertising" was one of the "serious social and political evils" that "were in large measure responsible for bringing on prohibition" and "that cannot be reached by the States." S. Rep. No. 1215, *supra,* at 6-7.

2. a. In April 1987, respondent, the Adolph Coors Company, applied to the Bureau of Alcohol, Tobacco and Firearms (ATF) within the Treasury Department for approval of labels and advertisements that included statements of the alcohol content of Coors' beer. C.A. App. 6-10. ATF denied the application based on Sections 205(e)(2) and 205(f)(2). App., *infra,* 73a-74a.

b. In July 1987, Coors filed this action against the Secretary and the Director of ATF in the United States District Court for the District of Colorado. Coors sought a declaratory judgment that the prohibition of alcohol content statements in Sections 205(e)(2) and 205(f)(2) and their implementing regulations violates the First Amendment; Coors also sought an injunction barring enforcement of those provisions. C.A. App. 5. On cross-motions for summary judgment, the district court held that the provisions violate the First Amendment, and it enjoined their enforcement. App., *infra,* 43a-54a.

c. The Tenth Circuit reversed. App., *infra,* 10a-31a. It applied the four-part test articulated in *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n,* 447 U.S. 557 (1980), for analyzing restrictions on commercial speech.[6] The Tenth Circuit first determined that Sections 205(e)(2) and 205(f)(2) regulate lawful activity that is not misleading. App., *infra,* 15a. The Tenth Circuit next held that those provisions are intended to further the federal

[6] App., *infra,* 14a, quoting *Central Hudson,* 447 U.S. at 566:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

government's "substantial" interest in "maintain[ing] moderate levels of alcohol in beer in order to protect the consumer." *Id.* at 19a.[7] But the court held that there were disputed issues of fact with regard to the third and fourth parts of the *Central Hudson* test. *Id.* at 21a-31a.[8] It accordingly reversed the order granting summary judgment in favor of Coors and remanded to the district court for further proceedings. *Id.* at 31a.

3. a. On remand, the government introduced extensive evidence concerning current conditions in the malt beverage industry. Much of that evidence related to the malt liquor segment of the industry. See, *e.g.*, C.A. App. 171-193. The government's evidence demonstrated that a primary reason why people drink malt liquor instead of other types of beer is to get drunk, C.A. App. 80, 88,[9] and that malt liquor producers market their product by emphasizing its potency, C.A. App. 201.[10] The evidence included numerous recent cases of marketing efforts that violated the regulations prohibiting statements of alcohol content. See, *e.g.*, C.A. App. 171-193; DXs C, D, and O through X. That evidence was not limited to the malt liquor segment of the market. C.A. App. 171, 174, 181, 187; DX AJ. It showed, for example, that Coors had distributed wallet cards listing the alcohol content of its own beers and those of its competitors. C.A. App. 171, 197-198; DXs AZ, BA, BB.

The district court upheld the advertising restriction in Section 205(f)(2), but it struck down the labeling restriction in Section 205(e)(2). App., *infra*, 32a-42a. The court found that there was a continuing threat of strength wars that justified a prohibition on statements of alcohol content in advertising, *id.* at 34a, but it regarded labeling as different because it believed that statements of alcohol content on labels would be used by consumers primarily to limit their intake of alcohol, *id.* at 37a.

b. Coors did not challenge the district court's ruling upholding Section 205(f)(2)'s prohibition of alcohol content statements in advertising. The government, by contrast, did appeal from the district court's ruling striking down the labeling restriction in Section 205(e)(2).[11]

c. A different panel of the Tenth Circuit affirmed. App., *infra*, 1a-9a. The panel began by rejecting the government's contention that it was required, under the

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[7] The Tenth Circuit criticized the district court for "focus[ing] primarily on the validity of the asserted ends given the passage of time and changed circumstances." App., *infra*, 19a. The court of appeals found it "irrelevant that the circumstances giving rise to a particular piece of legislation have changed so long as the legislation continues to serve some valid and substantial government interest." *Id.* at 20a. The court of appeals concluded that the government had advanced "a legitimate and substantial interest" here by identifying "a continuing danger of strength wars similar to those that existed in 1935." *Ibid.*

[8] The court of appeals determined that "the record here does not unambiguously reflect a correct legislative judgment that the enacted means directly advance the intended ends." App., *infra*, 21a. In the court's view, "the link between advertising and strength wars is not self-evident," *ibid.*, and there were "genuine issues of material fact underlying the question of whether * * * the complete prohibition of [statements of alcohol content] results in a 'reasonable fit' between the legislature's goal and the means chosen to reach it," *id.* at 31a.

[9] See also, *e.g.*, DXs AW (at 10), BZ (at 2), CD (at 9), CE (at 5), CI (at 19), CL (at 11, 17); Deposition of Hubert Nelson (Nelson Dep.) 10.

[10] See also, *e.g.*, DXs B, C, D, BT, CA, CD (at 4), CE (at 5), CL (at 17), CS (at 11); Nelson Dep. 15, 25, 33, 123.

[11] ATF published an interim rule suspending enforcement of the regulatory provisions that implement the statutory labeling restriction. 58 Fed. Reg. 21,228 (1993). At the same time, ATF stated: "The Government continues to believe the [labeling] prohibition to be Constitutional." *Ibid.*

third part of the *Central Hudson* test, to show only that Congress "reasonably believed" that the labeling restriction would further the goal of preventing strength wars. The court expressed the view that this Court, in *Edenfield* v. *Fane,* 113 S. Ct. 1792 (1993), had adopted a "much stricter" standard for applying the third part of the *Central Hudson* test. App., *infra,* 5a.

The Tenth Circuit then held that, under the stricter test, the government had failed to show that the labeling restriction furthers the goal of preventing strength wars "in a direct and material way." App., *infra,* 7a.[12] The court recognized that the legislative history supported Congress's judgment that the labeling restriction would "result[ ] over the long term in beers with a lower alcohol content." *Id.* at 6a, quoting *id.* at 17a (first court of appeals decision). But focusing on perceived "changes in the malt beverage industry," the court determined that the government's evidence of a continuing threat of strength wars was insufficient in three ways. *Id.* at 6a-9a. First, the court discounted the evidence on the ground that it primarily concerned the malt liquor segment of the market. *Id.* at 7a. Second, the court believed that there was an "absence of any record evidence indicating that there are strength wars in states or other countries where alcohol content labeling is already required." *Id.* at 8a. Finally, the court was unable to discern any evidence that "Coors would engage in a strength war if it were able to disclose the alcohol content of its malt beverages." *Id.* at 8a-9a.[13]

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[12] The court accordingly found it unnecessary to decide whether Section 205(e)(2) satisfies the "reasonable fit" requirement of the fourth part of the *Central Hudson* test. App., *infra,* 9a n.6.

[13] The Tenth Circuit rejected the government's petition for rehearing and suggestion of rehearing en banc. App., *infra,* 55a-56a.

REASONS FOR GRANTING THE PETITION

The Tenth Circuit has declared unconstitutional a long-standing Act of Congress that prohibits the disclosure of alcohol content on the labels of malt-beverage containers. The Tenth Circuit's decision rests in part on an error similar to the one that this Court granted certiorari to correct last term in *United States* v. *Edge Broadcasting Co.,* 113 S. Ct. 2696, 2703 (1993). The Tenth Circuit here, like the Fourth Circuit in *Edge Broadcasting,* ignored that one of the goals underlying the challenged federal statute is to integrate its operation with a variety of state laws. The Tenth Circuit also erred by adopting a "much stricter" standard of review under the third part of the *Central Hudson* test than this Court has applied, and by ignoring historical and record evidence supporting the labeling restriction in Section 205(e)(2). The Tenth Circuit's errors warrant review by this Court, not only because the decision below invalidates an Act of Congress that directly advances the legitimate governmental interest in preventing strength wars, but also because it casts serious doubt on the validity of comparable labeling restrictions that have been adopted in the majority of the States.

1. a. In *Edge Broadcasting,* this Court granted certiorari "[b]ecause the court below declared a federal statute unconstitutional and applied reasoning that was questionable under [the Court's] cases relating to the regulation of commercial speech." 113 S. Ct. at 2703. The same is true here.

At issue in *Edge Broadcasting* were the federal statutes (18 U.S.C. 1304 and 1307) that prohibit lottery advertising in States that do not operate lotteries but permit lottery advertising in States that do operate lotteries. 113 S. Ct. at 2700-2701. The Fourth Circuit held that the statutes violated the First Amendment because, as applied to Edge Broadcasting, they "d[id] not directly advance the governmental interest asserted." *Edge Broadcasting Co.* v.

United States, 5 F.3d 59, 62 (1992) (per curiam), rev'd, *United States* v. *Edge Broadcasting Co.*, *supra*. The Fourth Circuit based its holding on the fact that Edge Broadcasting's listeners in North Carolina, a State that does not operate a lottery, were "inundated" with lottery advertisements from neighboring Virginia, which operates a lottery. *Ibid.* The Fourth Circuit decided that, with respect to that audience, the federal restriction provided only "ineffective or remote" support for "North Carolina's desire to discourage gambling." *Ibid.*

This Court reversed the Fourth Circuit's holding. *Edge Broadcasting*, 113 S. Ct. at 2704. The Court emphasized that the fact upon which the Fourth Circuit had relied did not mean that the federal statutes provided only "remote" support for the goal of protecting the interests of non-lottery States like North Carolina; it meant, instead, that the statutes supported the additional goal of protecting the interests of States, like Virginia, that have state-sponsored lotteries (*ibid.*):

> In response to the appearance of state-sponsored lotteries, Congress might have continued to ban all radio or television lottery advertisements, even by stations in States that have legalized lotteries. This it did not do. * * * Instead of favoring either the lottery or the nonlottery State, Congress opted to support the anti-gambling policy of a State like North Carolina * * *. At the same time it sought not to unduly interfere with the policy of a lottery sponsoring State such as Virginia. * * * This congressional policy of balancing the interests of lottery and nonlottery States is the substantial governmental interest that satisfies *Central Hudson*, the interest which the courts below did not fully appreciate.

Like the Fourth Circuit in *Edge Broadcasting*, the Tenth Circuit in this case did not fully appreciate the federal interests underlying Section 205(e)(2)'s prohibition of state-

ments of alcohol content on malt-beverage containers. The Tenth Circuit recognized that Congress's central goal was to prevent "strength wars" among the brewers of malt beverages. App., *infra*, 4a. The Tenth Circuit ignored, however, the clear evidence of congressional intent to pursue that goal in a manner that would respect and facilitate, and not supplant, state regulation of alcohol pursuant to the Twenty-first Amendment.[14] Congress might have chosen to prevent strength wars by enacting federal restrictions on the alcohol content of malt beverages, rather than restrictions on statements of their alcohol content. "This it did not do." *Edge Broadcasting*, 113 S. Ct. at 2704.[15] Instead, Congress adopted a measure that reflects not only the goal of preventing strength wars but also the goal of respecting state authority over alcoholic beverages.

The Tenth Circuit's first error was in failing to discern any "link between advertising and strength wars." App., *infra*, 21a. There is a clear link, however, between dis-

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[14] One of the stated purposes of the FAAA is "to enforce the twenty-first amendment." 27 U.S.C. 203; see also *Arrow Distilleries, Inc.* v. *Alexander*, 109 F.2d 397, 401 (7th Cir.), cert. denied, 310 U.S. 646 (1940). The legislative history confirms that Congress was careful to adopt measures that were "appropriate and within the constitutional power of Congress," in light of the Twenty-first Amendment's recognition of each State's authority over "[t]he transportation or importation * * * of intoxicating liquors" across its border "for delivery or use therein." S. Rep. No. 1215, 74th Cong., 1st Sess. 3 (1935); H.R. Rep. No. 1542, 74th Cong., 1st Sess. 4 (1935); see also *Arrow Distilleries*, 109 F.2d at 400-401.

[15] Congress could reasonably have concluded that it had authority to impose federal limits on alcohol content pursuant to its power to regulate interstate commerce. See *324 Liquor Corp.* v. *Duffy*, 479 U.S. 335, 346-347 (1987); *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 274-276 (1984); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 714 (1984); *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980); *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331-332 (1964).

couraging the purchase of beer on the basis of its high alcohol content and prohibiting statements of alcohol content in beer labeling and advertising. This Court has recognized as a matter of common sense that advertising stimulates consumer demand for the product being advertised. See *Edge Broadcasting*, 113 S. Ct. at 2707; *Posadas de Puerto Rico Assocs.* v. *Tourism Co.*, 478 U.S. 328, 342 (1986); *Central Hudson*, 447 U.S. at 569. It should be equally self-evident that manufacturers are unlikely to compete with each other on the basis of a product characteristic that they cannot advertise. And if consumers cannot readily obtain information about a product's characteristic, they are unlikely to make purchases based on that characteristic.

The Tenth Circuit also failed to consider the matrix of state laws that Congress intended to respect in enacting the FAAA. As an initial matter, Sections 205(e)(2) and 205(f)(2) operate in tandem with state labeling and advertising laws applicable to wholly intrastate commerce in malt beverages. See pp. 4-5 & note 3, *supra*, and pp. 23-27, *infra*.

In addition, as witnesses at the FACA Hearing in 1934 explained, state alcohol regulations at that time (as now) often included restrictions on the alcohol content of malt beverages. *FACA Hearing* 10-11, 38-39, 60, 62, 75-76. Those restrictions differed from State to State (and continue to do so, see DX DA (at 272-273)). If a State imposes a restriction on alcohol content, the restriction reflects a judgment by that State regarding the maximum alcohol content appropriate for the health and welfare of its citizens. The FAAA's restrictions on the disclosure of alcohol content give effect to such a judgment by an individual State by making it less likely that a citizen of that State will travel to another State to purchase beer with a

higher alcohol content.[16] In this respect, the FAAA provisions operate like the federal statute at issue in *South Dakota* v. *Dole*, 483 U.S. 203, 205 (1987), which conditioned federal highway funds on a State's enactment of

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[16] In a related context, this Court has recognized that people cross state lines to purchase beer at lower prices. See *Healy* v. *The Beer Inst.*, 491 U.S. 324, 326 (1989); *Falls City Indus., Inc.* v. *Vanco Beverage, Inc.*, 460 U.S. 428, 437 & n.8 (1983). It is just such behavior, which reflects the close connection between consumer purchasing decisions and product information, that has led the lower federal courts and the state courts to uphold, against First Amendment challenges, state restrictions on price advertising of alcoholic beverages. See *Queensgate Investment Co.* v. *Liquor Control Comm'n*, 433 N.E.2d 138 (Ohio) (per curiam), appeal dismissed for want of a substantial federal question, 459 U.S. 807 (1982); *S & S Liquor Mart, Inc.* v. *Pastore*, 497 A.2d 729 (R.I. 1985); *Rhode Island Liquor Stores Ass'n* v. *Evening Call Pub. Co.*, 497 A.2d 331 (R.I. 1985). "Common sense tells us that a lifting of the ban on price advertising will lead to a more competitive market." *44 Liquor Mart, Inc.* v. *Racine*, 829 F. Supp. 543, 554 (D.R.I. 1993); accord *S & S Liquor Mart*, 497 A.2d at 735. Part of the reason such restrictions reduce the consumption of alcohol, of course, is that they prevent alcohol vendors from engaging in price competition. Just as alcohol price advertising restrictions prevent "price wars," so too do alcohol content restrictions prevent "strength wars." The Tenth Circuit's contrary conclusion therefore cannot be squared with the case law concerning restrictions on price advertising. Cf. *Capital Broadcasting Co.* v. *Mitchell*, 333 F. Supp. 582 (D.D.C. 1971) (upholding against First Amendment challenge ban on broadcast of cigarette advertising), aff'd mem., 405 U.S. 1000 (1972); *Dunagin* v. *City of Oxford*, 718 F.2d 738 (5th Cir. 1983) (upholding against First Amendment challenge prohibition of most forms of alcohol sign advertising), cert. denied, 467 U.S. 1259 (1984); *Oklahoma Telecasters Ass'n* v. *Crisp*, 699 F.2d 490 (10th Cir. 1983) (rejecting First Amendment challenge to prohibition of all alcohol advertising except for one storefront sign), rev'd on other grounds *sub nom. Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691 (1984); *Princess Sea Indus., Inc.* v. *State*, 635 P.2d 281 (Nev. 1981) (upholding against First Amendment challenge restrictions on brothel advertising), cert. denied, 456 U.S. 926 (1982).

laws prohibiting people under 21 years of age from possessing alcoholic beverages. This Court upheld that exercise of Congress's spending power, holding that the condition was "directly related to one of the main purposes for which highway funds are expended—safe interstate travel." *Id.* at 208.

In sum, the Tenth Circuit failed to identify the full governmental interests underlying the challenged federal statute, as did the Fourth Circuit in *Edge Broadcasting*. The federal restrictions on statements of alcohol content directly advance Congress's goals of ensuring that "[m]alt beverages should not be sold on the basis of alcohol content," H.R. Rep. No. 1542, 74th Cong., 1st Sess. 12 (1935), and supplementing state restrictions on labeling, advertising, and alcohol content.

b. Furthermore, the Tenth Circuit applied the wrong standard in analyzing Section 205(e)(2) under the third part of the *Central Hudson* test. The government acknowledged below that, under that part of the test, it was required to show that Section 205(e)(2) "directly advances" the interest in preventing strength wars among malt beverage producers. 92-1348 Gov't C.A. Br. 23. The government emphasized, however, that such a showing is not limited to evidence regarding current conditions in the beer industry; the court also had to consider whether "Congress 'reasonabl[y]' believed, '*when it enacted the [labeling] restrictions at issue here,*' that the statutory prohibition would further its objective." *Ibid.*, quoting *Posadas*, 478 U.S. at 341-342. The government accordingly argued that both the legislative history of the labeling restriction and the evidence in the record regarding current conditions support the conclusion that the restriction directly advances the asserted governmental interest.

The Tenth Circuit rejected that position. It read this Court's decision in *Edenfield* v. *Fane*, 113 S. Ct. 1792 (1993), as adopting a "much stricter" standard for applying the third part of the *Central Hudson* test. App., *infra*, 5a. Applying a heightened standard, the court accorded no weight to the historical evidence, even though the court recognized that it supports Congress's judgment that the labeling restriction in Section 205(e)(2) would "result[ ] over the long term in beers with a lower alcohol content." *Id.* at 6a, quoting *id.* at 17a. Instead, based on perceived "changes in the malt beverage industry" (*id.* at 6a), the court required the government to demonstrate the "continuing validity" of that judgment (*id.* at 7a).

The Tenth Circuit misread *Edenfield*. *Edenfield* did not purport to heighten the showing required under the third part of the *Central Hudson* test, and the subsequent decision in *Edge Broadcasting* confirms that the third part of the *Central Hudson* test remains the same. 113 S. Ct. at 2704. Nor does *Edenfield* sanction the Tenth Circuit's disregard (App., *infra*, 6a-9a) of the historical evidence supporting Section 205(e)(2) in its second decision. See *Burson* v. *Freeman*, 112 S. Ct. 1846, 1856 (1992) (plurality); cf. *id.* at 19a (first court of appeals decision).

Indeed, the Tenth Circuit would have been justified in analyzing Section 205(e)(2) under a *less* stringent standard than this Court has required in *Central Hudson* and its progeny. Unlike the provisions at issue in those decisions, Section 205(e)(2) was intended to facilitate the enforcement of state laws regulating alcoholic beverages. In *California* v. *LaRue*, 409 U.S. 109 (1972), this Court held that, in a First Amendment challenge, such state laws are entitled to an "added presumption in favor of * * * validity." *Id.* at 118; see *id.* at 114 ("the broad sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public

health, welfare, and morals"); see also, *e.g.*, *City of Newport* v. *Iacobucci*, 479 U.S. 92, 95 (1986) (per curiam); *New York State Liquor Authority* v. *Bellanca*, 452 U.S. 714 (1981) (per curiam); *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 932-933 (1975). The same should hold true in a First Amendment challenge to federal laws, such as Section 205(e)(2), that complement state alcohol laws. To conclude otherwise would mean that a state law could be upheld while a federal law necessary to effective enforcement of the state law could be invalidated. Such a result would be particularly anomalous where, as here, the operation of the federal law and numerous state laws is closely integrated. See pp. 24-27, *infra*.

c. The Tenth Circuit's primary criticism of the government's showing under the third part of the *Central Hudson* test was that it "relie[d] primarily" on evidence regarding the malt liquor segment of the malt beverage industry. App., *infra*, 7a.[17] The Tenth Circuit believed that evidence of a risk of strength wars among malt liquor producers did not justify a labeling restriction covering the entire industry. *Ibid.* The Tenth Circuit's analysis was flawed.

In the first place, the Tenth Circuit's analysis is at odds with the district court's unchallenged holding that the *advertising* restriction in Section 205(f)(2), which applies to all malt beverages, satisfies the third part of the *Central Hudson* test. App., *infra*, 34a. There is nothing in law or logic to support the conclusion that the same evidence that sustained the advertising restriction in Section 205(f)(2) does not also sustain the labeling restriction in Section

[17] The government also presented evidence of unlawful statements of alcohol content outside the malt liquor segment of the market, including evidence concerning Coors' use of "wallet cards" comparing the alcohol content of its beers to those of its competitors. See C.A. App. 171, 174, 181-182, 186-187. The Tenth Circuit ignored that evidence.

205(e)(2). See *Kordel* v. *United States*, 335 U.S. 345, 351 (1948) ("Every labeling is in a sense an advertisement."); *Halter* v. *Nebraska*, 205 U.S. 34 (1907); see also *Hornell Brewing Co.* v. *Brady*, 819 F. Supp. 1227, 1237 (E.D.N.Y. 1993); Pa. Stat. Ann. tit. 47, § 4-493(8) (1969) (making it unlawful to publish or post "any advertisement of any malt or brewed beverage *including a label*" referring to alcoholic strength) (emphasis added).

The Tenth Circuit also erred by considering the labeling restriction in Section 205(e)(2) in isolation, without regard to the advertising restriction in Section 205(f)(2). The Tenth Circuit found the evidence insufficient to show that, in the absence of Section 205(e)(2), there would be strength wars. Even assuming that Section 205(e)(2) were insufficient by itself to prevent strength wars, however, that would not condemn the provision. Congress did not intend Section 205(e)(2) to bear that burden on its own. Section 205(e)(2) was intended to act in concert with Section 205(f)(2)'s restriction upon advertising.

d. In any event, the Tenth Circuit should have analyzed the question of whether Section 205(e)(2)'s prohibition of malt beverage alcohol content statements was overly broad (insofar as it applies to all types of beer and not just malt liquor) under the fourth (not the third) part of the *Central Hudson* test. The fourth part examines whether the challenged provision is "more extensive than is necessary" to achieve its asserted purpose. *Board of Trustees* v. *Fox*, 492 U.S. 469, 475-481 (1989). If the Tenth Circuit had properly examined the matter under the fourth part of the *Central Hudson* test, it would have been obligated to accord substantial deference to Congress's judgment on the "fit" between the legislative means and the legislative ends. *Id.* at 479-481; see *Edge Broad-*

casting, 113 S. Ct. at 2707; *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Comm.*, 483 U.S. 522, 539 (1987); *Posadas*, 478 U.S. at 341-342; *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490, 509 (1981). There plainly is a reasonable fit between the prohibition of statements of alcohol content on beer labels and Congress's goal of preventing strength wars.

The Tenth Circuit thought that Congress could prevent strength wars equally effectively by prohibiting statements of alcohol content only with respect to malt liquor, and not with respect to other types of beer. See App., *infra*, 7a-8a. Congress, however, could reasonably have concluded otherwise. Congress's concern was not about a particular type of beer; its concern was about a particular type of beer-drinker: people who, in the absence of a prohibition on the disclosure of alcohol content, would choose a beer based on its alcohol strength. A universal labeling ban—*i.e.*, one applicable to all types of malt beverages—would more effectively prevent those people from choosing a malt beverage based on its high alcohol content than would a ban applicable only to malt liquor. First, a universal labeling ban would generally prevent consumers from knowing with certainty even that malt liquors, as a category, have higher alcohol content than other types of beer. II Tr. 194 (testimony of Coors official that "there are a percent of consumers who do not currently know that certain categories of beer have more or less alcohol"). In addition, a universal labeling ban would generally prevent consumers from choosing among brands of *any* type of malt beverage on the basis of their high alcohol content.

The differing operation of the universal labeling ban and a ban applicable only to malt liquor can be illustrated

by considering people who have just reached legal drinking age. Those young people, like many alcohol consumers at the end of Prohibition, may have a pent-up desire for intoxicating beverages. The young drinkers may not know that malt liquor is the type of beer with the highest alcohol content. They would readily be able to figure that out, however, if the disclosure of alcohol content was prohibited only with respect to beers the alcohol content of which exceeded a certain number.[18]

The fit between the labeling restriction in Section 205(e)(2) and the goal of preventing strength wars cannot be challenged on the ground that the restriction prevents persons from choosing beer on the basis of its *low* alcohol content. ATF has construed Section 205(e)(2) to permit brewers to label and advertise their beers as "reduced alcohol" and "low alcohol." 54 Fed. Reg. 3591, 3594 (1989) (adding 27 C.F.R. 7.26(b)-(d)). Thus, Section 205(e)(2) only prevents people from selecting any type of beer because of its high alcohol content.[19]

2. Review of the Tenth Circuit's decision is warranted because it invalidates an Act of Congress that has governed the labeling of malt beverages for almost sixty years. Review is warranted for the additional reason that the decision below casts serious doubt on the constitutionality

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[18] For example, if the disclosure of alcohol content was prohibited with respect to beer that contained more than 5% alcohol, and was required for beer that contained 5% or less alcohol, a consumer could safely conclude that beer that did not disclose its alcohol content contained more than 5% alcohol.

[19] The court of appeals also erred in believing that there was no evidence from other countries to support the effectiveness of the labeling restriction in preventing strength wars. App., *infra*, 8a. In fact, there was evidence in the record concerning Canada and Britain, where disclosure of alcohol content is permitted, suggesting that the labeling ban has the effect of preventing strength wars. C.A. App. 156, 220.

of numerous state laws that prohibit statements of alcohol content on malt-beverage containers.

Twenty-one States and the District of Columbia prohibit statements of alcohol content on the labels of some or all types of beer.[20] Included in this category is Utah,

[20] Ala. Code § 28-3A-6(c) (1986) (requiring brewers to file federal certificates of label approval with the State); Ariz. Comp. Admin. R. & Regs. R4-15-220(6) (1990) (requiring compliance with federal labeling requirements); Conn. Agencies Regs. § 30-6-A35(m) (1976) (expressly incorporating federal labeling requirements as state law); Del. Alc. Bev. Cont. Comm. Regs. Rule 13(b) (1991) (requiring compliance with federal labeling requirements); D.C. Mun. Regs. tit. 23, § 910 (1988) (incorporating federal labeling provisions in part); *Modern Brewery Age* (*Blue Book*) 267 (53rd ed. 1993) (digest of alcohol labeling requirements for D.C.); Ill. Admin. Code tit. 11, § 100.70(b)(9) (1991) (no beer containers "shall have affixed thereto any label or statement showing the alcoholic content thereof"); Alc. Bev. Comm'n of Ind. Bull. 23 (Aug. 4, 1938) (malt beverage labels may not indicate alcohol content by numerals or descriptive terms); Ky. Rev. Stat. Ann. § 244.520 (Bobbs-Merrill 1981) (malt beverage labels may not "refer[ ] in any manner to the alcoholic strength"); Me. Rev. Stat. Ann. tit. 28-A, § 711(1)(A) (West 1988) (malt beverage labels may not "refer[ ] in any manner to the alcohol content"); Mich. Admin. Code r. 436.1611 (1989) (requiring compliance with federal labeling requirements); N.J. Admin. Code tit. 13, § 2-27.1 (1990) (requiring compliance with federal labeling requirements); N.Y. Alco. Bev. Cont. Law App. § 84.6(a) (McKinney 1987) (prohibiting disclosure of alcohol content on malt beverage labels); Ohio Rev. Code Ann. § 4301.03(D) (Supp. 1993); Pa. Stat. Ann. tit. 47, § 4-493(7) (1969) (malt beverage labels may not "in any manner refer[ ] to the alcoholic contents"); R.I. Liq. Cont. Admin. Regs. No. 17 (1992) (federal labeling requirements "will be enforced" by State); S.C. Code Ann. § 61-13-800 (Law. Co-op. 1990) (requiring compliance with federal labeling requirements); S.D. Codified Laws Ann. § 39-13-11 (1987) (compliance with federal labeling requirements deemed compliance with state law); *Modern Brewery Age, supra,* at 271 (indicating that South Dakota requires malt beverage labels to state "[n]ot over 3.2% alcohol by weight," apparently precluding other statements of alcohol content); Tex. Admin. Code tit. 16, § 45.79 (1991) ("[t]he alcoholic

which is located in the Tenth Circuit. Several States in this category, including Utah, expressly incorporate Section 205(e)(2) of the FAAA or its implementing regulations.[21] It is far from clear that any of the laws in this category would be upheld under the Tenth Circuit's analysis, even if they were accorded the "added presumption * * * of * * * validity" articulated in *California* v. *LaRue,* 409 U.S. at 118.

In addition, 20 States have adopted Section 205(e)(2)'s prohibition on alcohol content labeling by acquiescence—*i.e.,* by not requiring such statements on labels as a matter of state law.[22] Two of those States, Wyoming and New

content * * * shall not be stated" on malt beverage labels); Utah Admin. R. 96-1-3(3) (1991) (requiring compliance with federal labeling requirements); Va. Alc. Bev. Cont. Bd. Regs. § 5(A)(3) (1991) (requiring compliance with federal labeling requirements); cf. Va. Code Ann. § 4.1-103.8 (Michie 1993) (Board may by regulation establish labeling requirements); W. Va. Non-Intox. Beer Comm'n Regs. § 176-1-3.1 (1990) ("[t]here shall not be any statement as to alcoholic content on the bottle and can label" of malt beverages); Wis. Admin. Code § 7.21 (Dep't of Revenue) (1991) (requiring compliance with federal labeling requirements).

[21] See statutes and regulations cited in note 20, *supra,* for Alabama, Arizona, Connecticut, Delaware, Michigan, New Jersey, South Carolina, Utah, Virginia, and Wisconsin.

[22] See *Modern Brewery Age, supra,* at 266-272, which indicates that the federal prohibition of malt beverage alcohol content statements on labels has been adopted, by virtue of the State's not requiring such statements, in 19 States: Alaska, Florida, Georgia, Hawaii, Iowa, Kentucky, Louisiana, Maryland, Massachusetts (with respect to malt beverages containing more than 3.2% alcohol by weight), Mississippi, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Tennessee, Vermont, and Wyoming. Our research indicates that there are two additional States, Idaho and Washington, that adopt the federal prohibition by acquiescence, but that Kentucky has enacted its own statute prohibiting statements of alcohol content on malt-beverage containers, rather that simply acquiescing in the federal prohibition. See Ky. Rev. Stat. Ann. § 244.520 (Bobbs-Merrill 1981).

Mexico, are in the Tenth Circuit. The effect of the Tenth Circuit's decision is to invalidate a prohibition that has previously been in effect in those two States and to create uncertainty regarding the regulatory framework in the other 18 States as well. See note 20, *supra*.

Finally, 10 States require an alcohol content statement on labels of malt-beverage containers, but in most cases only with respect to beer above or below a certain alcohol percentage.[23] Included in this category are the two remaining Tenth Circuit States: Kansas and Oklahoma. The decision below casts doubt on the validity of those laws insofar as they prohibit alcohol content statements on the labels of some beer.

In sum, the vast majority of the States prohibit statements of alcohol content on malt beverage labels at least

[23] Ark. Alc. Bev. Cont. Div. Regs. § 2.17 (1991) (requiring malt beverages containing more than 5% alcohol by weight to be labeled as such); Cal. Code Regs. tit. 4, § 130 (1990) (prohibiting alcohol content statements on labels of malt beverages containing more than 4% alcohol by weight); Colo. Code Regs. § 46-112.3.C (1993) (malt beverage labels must indicate that alcohol content is not more than 3.2% by weight); Kan. Admin. Regs. §§ 14-7-2(c), 92-8-9a (1985) (malt beverage labels must state "does not contain more than 3.2% alcohol by weight"); Mass. Ann. Laws ch. 138, § 15 (Law. Co-op. 1981) (malt beverages containing 3.2% alcohol by weight or less "shall be so labelled"); Minn. R. § 7515.1110, subp. 2 (1985) (malt beverage labels must state "contains not more than 3.2 percent of alcohol by weight"); Mo. Rev. Stat. § 312.310 (Supp. 1993) (malt beverage labels must state "alcoholic content not in excess of [3.2% by weight or 4% by volume]"); Mont. Admin. R. § 42.13-201(2) (1993) ("[a]lcohol content by weight must be noted on the labels of all malt beverages" containing more than 7% alcohol by weight); Okla. Stat. Ann. tit. 37, § 163.19(b) (West 1985) (malt beverage labels may not indicate that alcohol content exceeds 3.2% by weight); Or. Admin. R. 845-10-205(2), (4) (1992); *Modern Brewery Age*, *supra*, at 270-271 (Oregon requires disclosure of alcohol content on labels of malt beverages containing more than 4% alcohol by weight).

under certain circumstances, either by positive law or by acquiescing in Section 205(e)(2)'s prohibition. As a result, the First Amendment issue raised by this case is of significant and far-reaching importance for numerous States as well as the United States. Review by this Court therefore is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1994

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 92-1348

ADOLPH COORS COMPANY, PLAINTIFF-APPELLEE

v.

LLOYD BENTSEN,* IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF TREASURY; AND STEVE HIGGINS, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, DEFENDANTS-APPELLANTS

AND

SPEAKER AND BIPARTISAN LEADERSHIP OF THE U.S. HOUSE OF REPRESENTATIVES, INTERVENOR-DEFENDANT

Aug. 23, 1993

Before TACHA and BARRETT, Circuit Judges, and BROWN, District Judge.**

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* Lloyd Bentsen is substituted for Nicholas Brady pursuant to Fed.R.App.P 43(c)(1).

** Honorable Wesley E. Brown, Senior District Judge, United States District Court for the District of Kansas, sitting by designation.

TACHA, Circuit Judge.

Appellants (collectively referred to as the "Government") appeal a district order declaring the portion of 27 U.S.C. § 205(e)(2) which prohibits statements of alcohol content on malt beverage labels to be an unconstitutional restraint on commercial speech in violation of the First Amendment. The Government also appeals the court's order enjoining the Government from enforcing that provision. We exercise jurisdiction under 28 U.S.C. § 1291 and affirm.

I. Background

Congress enacted the Federal Alcohol Administration Act ("Act"), 27 U.S.C. §§ 201-211, in 1935 after the repeal of Prohibition. The Act contains comprehensive regulations of the alcoholic beverage industry, including provisions that were intended to remedy industry practices which Congress had determined were unfair, deceptive, and harmful to both competitors and consumers. Two such provisions prohibit statements of alcohol content on malt beverage[1] labels and advertisements unless such disclosures are required by state law. 27 U.S.C. § 205(e)(2), (f)(2).[2]

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[1] "Malt beverage" is defined at 27 C.F.R. § 7.10.

[2] Section 205 provides in relevant part:

> It shall be unlawful for any person engaged in business as a distiller, brewer, rectifier, blender, or other producer, or as an importer or wholesaler, of distilled spirits, wine, or malt beverages . . . directly or indirectly or through an affiliate:
>
> * * * * *
>
> (e) Labeling
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> To sell or ship or deliver for sale or shipment, or otherwise introduce in interstate or foreign commerce, or to receive therein, or to remove from customs custody for consumption, any distilled spirits, wine, or malt beverages in bottles unless such products are bottled, packaged, and labeled in conformity with such regulations, to be prescribed by the Secretary of the Treasury, with respect to packing, marking, branding, and labeling and size and fill of container . . . (2) as will provide the consumer with adequate information as to the identity and quality of the products, the alcoholic content thereof (*except that statements of, or statements likely to be considered as statements of, alcoholic content of malt beverages are prohibited unless required by State law* . . .).
>
> * * * * *
>
> (f) Advertising
>
> To publish or disseminate or cause to be published or disseminated by radio broadcast, or in any newspaper, periodical or other publication or by any sign or outdoor advertisement or any other printed or graphic matter, any advertisement of distilled spirits, wine, or malt beverages, if such advertisement is in, or is calculated to induce sales in, interstate or foreign commerce, or is disseminated by mail, unless such advertisement is in conformity with such regulations, to be prescribed by the Secretary of the Treasury, . . . (2) as will provide the consumer with adequate information as to the identity and quality of the products advertised, the alcoholic content thereof (*except the statements of, or statements likely to be considered as statements of, alcoholic content of malt beverages and wines are prohibited*). . . .
>
> 27 U.S.C. § 205 (emphasis added).

In 1987, Adolph Coors Co. ("Coors") sought the Bureau of Alcohol, Tobacco and Firearm's approval for proposed labels and advertisements that disclosed the alcohol content of its malt beverages. The bureau denied the request pursuant to § 205(e)(2) and (f)(2). Coors then brought this action to challenge the decision, arguing that the provisions impose an unconstitutional restraint on commercial speech in violation of the First Amendment.

The district court granted summary judgment for Coors and the Government appealed. On appeal, we evaluated

the provisions under the four-part test for restrictions on commercial speech set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980):

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id. at 566, 100 S.Ct. at 2351. Applying the first two parts of the test, we concluded that the proposed labels and advertisements were commercial speech protected by the First Amendment and that the Government had asserted a legitimate and substantial interest in preventing strength wars among malt beverage brewers. *See Adolph Coors Co. v. Brady*, 944 F.2d 1543, 1547-49 (10th Cir. 1991) ("*Coors I*"). We reversed and remanded, however, holding that there were genuine issues of material fact as to whether the statutory prohibitions directly advance the Government's interest in preventing strength wars and whether there is a reasonable fit between the Government's asserted interest and the complete prohibitions imposed by the statute. *See id.* at 1554.

After conducting a trial on remand, the district court held that the relevant portion of § 205(f)(2) is constitutional, but that the portion of § 205(e)(2) which prohibits statements of alcohol content on malt beverage labels imposes an unconstitutional restraint on commercial speech

in violation of the First Amendment because it neither directly advances nor reasonably fits the goal of preventing strength wars. The Government now appeals the district court's judgment with respect to § 205(e)(2) and we limit our review to that provision.

II. Discussion

The Government has the burden of proving that the labeling prohibition of § 205(e)(2) directly advances its interest in preventing strength wars.[3] We stated in *Coors I* that the *Central Hudson* test requires "an immediate connection between the prohibition and the government's asserted end. If the means-end connection is tenuous or highly speculative, the regulation cannot survive constitutional scrutiny." 944 F.2d at 1549 (internal quotations omitted). The Government challenges this standard on appeal and, relying on *Posadas de Puerto Rico Association v. Tourism Co.*, 478 U.S. 328, 106 S.Ct. 2968, 92 L.Ed.2d 266 (1986), argues that the Government need only demonstrate that Congress reasonably believed that the statutory prohibition would further its objective when it enacted the labeling restriction. *See id.* at 341-42, 106 S.Ct. at 2976-77.

Since the Government filed its appellate brief, however, the Supreme Court has decided *Edenfield v. Fane*, ___ U.S. ___, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993), in which it articulates a standard that is consistent with our pronouncements in *Coors I* and much stricter than the "reasonably believed" standard the Government would have us adopt. In *Edenfield*, the Court stated that, under this third prong of the *Central Hudson* test, courts must

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[3] The parties do not dispute that the labeling of malt beverages' alcohol content is protected commercial speech under the first part of the *Central Hudson* test or that the Government has a substantial interest in preventing strength wars under the second part.

determine "whether the challenged regulation advances [the government's] interests in a direct and material way." *Id.*, at ____, 113 S.Ct. at 1798. It went on to say that the party restricting commercial speech carries the burden of justifying the restriction and that "[t]his burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Id.*, at ____, 113 S.Ct. at 1800. This burden also applies to prophylactic regulations like the challenged prohibition in § 205(e)(2) where the Government prohibits conduct at the outset rather than waiting until harm has occurred. *Id.*, at ____, 113 S.Ct. at 1803 (prophylactic ban "in no way relieves the State of the obligation to demonstrate that it is regulating speech in order to address what is in fact a serious problem and that the preventative measure it proposes will contribute in a material way to solving that problem").

The Government asserts that the prohibition on speech contained in § 205(e)(2) was imposed to prevent strength wars among malt beverage manufacturers. This assertion is supported by the Act's legislative history which contains testimony "that labels displaying alcohol content resulted in a strength war wherein producers competed for market share by putting increasing amounts of alcohol in their beer." *Coors I*, 944 F.2d at 1548. There was also hearing testimony "that not disclosing the alcohol content on malt beverages would relieve marketplace pressures to produce beer on the basis of alcohol content, resulting over the long term in beers with a lower alcohol content." *Id.* The Government argues that, despite changes in the malt beverage industry and market since 1935, § 205(e)(2) directly advances its crusade against the continuing danger of strength wars. After reviewing the record, we conclude

that, although the Government's interest in preventing strength wars is legitimate and is within its regulatory authority, the prohibition in § 205(e)(2) does not advance this interest in a direct and material way.

The Government relies primarily on anecdotal evidence that malt beverage manufacturers already are competing and advertising on the basis of alcohol strength in the malt liquor sector of the market.[4] The record contains evidence that consumers who prefer malt liquor do so primarily because of its higher alcohol content and that a number of manufacturers have tried to advertise malt liquor—in violation of the regulations—by using descriptive terms such as "power," "strong character," "dynamite," and "bull" to tout its alcohol strength. On the basis of this evidence, the Government makes an inferential and conclusory argument that the "experience of the malt liquor industry establishes the continuing validity of the statutory scheme" as applied to all malt beverages as well as "the very real danger of strength wars if the labeling ban is struck down."

This argument is unavailing. Although the evidence may support the Government's assertion that there is a continuing threat of strength wars which it aims to prevent, Coors does not contest either the existence of such a threat or the Government's interest in preventing strength wars. The critical question is whether the evidence shows the required relationship between the labeling prohibition that Coors is challenging and the threat of strength wars. Coors is challenging the prohibition on factual statements

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[4] "Malt liquor" is the term used to designate those malt beverages with the highest alcohol content, whereas light beer and non-alcoholic beer are malt beverages containing reduced alcohol content. Malt liquors represent approximately three percent of the malt beverage market.

regarding the percentage of alcohol by volume rather than the prohibition on the sort of descriptive terms that have been used in the malt liquor sector.[5] The Government simply has not shown a relationship between the publication of such factual information and strength wars.

The Government's argument is further undermined by the absence of any record evidence indicating that there are strength wars in states or other countries where alcohol content labeling is already required. *See Edenfield,* ____ U.S. at ____, 113 S.Ct. at 1800 (noting lack of anecdotal evidence from states that do not impose similar restrictions). In fact, there is uncontroverted evidence that brewers in the United States have no intention of increasing alcohol strength, regardless of labeling regulations, because the vast majority of consumers in the United States value taste and lower calories—both of which are adversely affected by increased alcohol strength.

Finally, the Government asserts that Coors is challenging the labeling restrictions because of its desire to counter a consumer perception that its malt beverages contain less alcohol than competing brands. This assertion, however, does not show directly, or even imply, that Coors would engage in a strength war if it were able to disclose the

[5] The Act's implementing regulations distinguish these two types of statements. Coors is challenging the type of restriction contained in 27 C.F.R. § 7.26(a) which provides that "[t]he alcoholic content and the percentage and quantity of the original extract shall not be stated unless required by State law." Coors is not challenging § 7.29(f), which provides that "[l]abels shall not contain the words 'strong', 'full strength', 'extra strength' . . . or similar words or statements, likely to be considered as statements of alcoholic content." Nor does it challenge § 7.29(g), which provides that "[l]abels shall not contain any statements, designs, or devices whether in the form of numerals, letters, characters, figures, or otherwise, which are likely to be considered as statements of alcoholic content."

alcohol content of its malt beverages on their labels. In fact, the opposite inference is more plausible—if Coors could overcome the misperception by simply publishing the percentage of alcohol content on the label, it would have no incentive to produce stronger beverages.

We find that the Government has offered no evidence to indicate that the appearance of factual statements of alcohol content on malt beverage labels would lead to strength wars or that their continued prohibition helps to prevent strength wars. Instead, it has offered only inferential arguments that are based on mere speculation and conjecture and fails to show that the prohibition advances the Government's interest in a direct and material way.[6] We therefore hold that the portion of 27 U.S.C. § 205(e)(2) which prohibits statements of alcohol content on malt beverage labels imposes an unconstitutional restraint on commercial speech in violation of the First Amendment.

AFFIRMED.

[6] Because we conclude that the Government has failed to satisfy its burden under the third part of the *Central Hudson* test, we need not proceed to the fourth part to determine whether there is a reasonable fit between the prohibition and the Government's interest.

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 89-1203, 89-1239

ADOLPH COORS COMPANY, PLAINTIFF-APPELLEE

v.

NICHOLAS BRADY, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF TREASURY; STEVE HIGGINS, IN HIS OFFICIAL CAPACITY AS DIRECTOR BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, DEFENDANTS-APPELLANTS

AND

SPEAKER AND BIPARTISAN LEADERSHIP GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES, INTERVENOR-DEFENDANT-APPELLANT

CENTER FOR SCIENCE IN THE PUBLIC INTEREST; G. HEILEMAN BREWING COMPANY, AMICUS CURIAE

Sept. 23, 1991

Before McKAY, McWILLIAMS and SEYMOUR, Circuit Judges.

SEYMOUR, Circuit Judge.

Nicholas Brady, Secretary of the Treasury, *et al.* (the Treasury), and intervenors Speaker and Bipartisan Leadership Group of the United States House of Representatives (the House), appeal the district court's grant of summary judgment in favor of Adolph Coors Co. (Coors). The district court ruled that 27 U.S.C. §§ 205(e) and 205(f) (1988), which prohibit the disclosure of alcohol content information in advertising or labeling malt liquor, constitute an illegal restraint on free speech in violation of the First Amendment, and enjoined the government's enforcement of the statute's restrictions. We reverse and remand.

I.

In 1987, Coors submitted an application to the Bureau of Alcohol, Tobacco and Firearms (BATF) requesting approval for labels and advertisements for its Coors and Coors Light beer that would disclose the alcohol content of these products. The BATF denied Coors' application stating that sections 205(e)(2) and 205(f)(2) prohibit labels or advertisements disclosing the alcohol content of malt beverages unless such disclosure is required by state law.[1]

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[1] 27 U.S.C. §§ 205(e)(2) and 205(f)(2) (1988) provide in relevant part:

"§ 205. Unfair competition and unlawful practices

"It shall be unlawful for any person engaged in business as a distiller, brewer, rectifier, blender, or other producer, or as an importer or wholesaler, of distilled spirits, wine, or malt beverages, or as a bottler, or warehouseman and bottler, of distilled spirits, directly or indirectly or through an affiliate:

". . . .

"(e) Labeling

"To sell or ship or deliver for sale or shipment, or otherwise introduce in interstate or foreign commerce, or to receive therein,

On July 2, 1987, Coors filed a complaint against the Secretary of the Treasury, and the Director of the BATF, alleging that sections 205(e) and 205(f) violate Coors' rights under the Free Speech Clause of the First Amendment because they prohibit Coors from disclosing truthful information as to the alcohol content of its malt beverages. Coors asked the district court to set aside the BATF's denial of Coors' labeling and advertisement application, and to declare the statutory sections invalid.

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or to remove from customs custody for consumption, any distilled spirits, wine, or malt beverage in bottles, unless such products are bottled, packaged, and labeled in conformity with such regulations, to be prescribed by the Secretary of the Treasury, with respect to packaging, marking, branding, and labeling and size and fill of container . . . (2) as will provide the consumer with adequate information as to the identity and quality of the products, the alcoholic content thereof (except that statements of, or statements likely to be considered as statements of, alcoholic content of malt beverages are prohibited unless required by State law and except that, in case of wines, statements of alcoholic content shall be required only for wines containing more than 14 per centum of alcohol by volume). . . .

". . . .

(f) Advertising

To publish or disseminate or cause to be published or disseminated by radio broadcast, or in any newspaper, periodical or other publication or by any sign or outdoor advertisement or any other printed or graphic matter, any advertisement of distilled spirits, wine, or malt beverages, if such advertisement is in, or is calculated to induce sales in, interstate or foreign commerce, or is disseminated by mail, unless such advertisement is in conformity with such regulations, to be prescribed by the Secretary of the Treasury . . . (2) as will provide the consumer with adequate information as to the identity and quality of the products advertised, the alcoholic content thereof (except the statements of, or statements likely to be considered as statements of, alcoholic content of malt beverages and wines are prohibited). . . ."

The Treasury admitted in its answer that sections 205(e)(2) and 205(f)(2) are unconstitutional under the First Amendment. The Justice Department, acting on behalf of the Treasury and BATF, also asserted that the Executive Branch believed restricting the labeling and advertising of the alcoholic content of malt beverages to be unconstitutional. The House, however, moved to intervene in order to defend the constitutionality of the statute.

The House and Coors filed cross-motions for summary judgment. Following a hearing, the district court issued an order holding that sections 205(e)(2) and 205(f)(2) constitute an illegal restraint on speech under the First Amendment, and enjoining the BATF from enforcing those provisions. The Treasury, which now defends the constitutionality of the statutory sections, and the House seek a reversal of the district court's order. The relevant facts and legal arguments presented to the district court and the legal conclusions drawn therefrom are summarized below.

II.

To review a summary judgment order, we apply the same standard used by the trial court under Fed.R.Civ.P. 56. *Osgood v. State Farm Mut. Auto Ins. Co.*, 848 F.2d 141, 143 (10th Cir.1988). Rule 56 directs that summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. This court determines whether, under the correct interpretation of the substantive law, there exist material factual disputes which preclude summary judgment. *See id.; see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 2509-10, 91 L.Ed.2d 202 (1986). In determining whether a material issue of fact exists, we review the record in the light most

favorable to the party opposing summary judgment. *McKenzie v. Mercy Hosp.*, 854 F.2d 365, 367 (10th Cir. 1988). The district court's conclusions of law are reviewed *de novo. Id.*

Commercial speech is that which does " 'no more than propose a commercial transaction.' " *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762, 96 S.Ct. 1817, 1825-26, 48 L.Ed.2d 346 (1976) (quoting *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 385, 93 S.Ct. 2553, 2558-59, 37 L.Ed.2d 669 (1973)). Advertising has been recognized as commercial speech. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637, 105 S.Ct. 2265, 2274, 85 L.Ed.2d 652 (1985). Product labels, which are part of a firm's marketing plan to provide certain information to the consumer, also constitute commercial speech. *See id.; Central Hudson Gas v. Public Serv. Comm'n*, 447 U.S. 557, 563, 100 S.Ct. 2343, 2350, 65 L.Ed.2d 341 (1980) (noting that "[t]he First Amendment's concern for commercial speech is based on the information function of advertising").

Regulations limiting commercial speech that are challenged on First Amendment grounds are subject to a four-part analysis described by the Supreme Court as follows:

> "At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest."

Central Hudson, 447 U.S. at 566, 100 S.Ct. at 2351.

A.

In order for commercial speech to come within the protection of the First Amendment under the first prong of the *Central Hudson* test, it must concern a lawful activity and not be misleading. *Id.* The labeling and advertising of malt beverages relate to an activity lawful under federal law. *U.S. Const.* amend. XXI, § 1 (repeal of Prohibition); *see also Dunagin v. City of Oxford*, 718 F.2d 738 (5th Cir. 1983) (although alcohol sales and consumption may be illegal in some state counties, such activity is nonetheless considered lawful for First Amendment purposes). Moreover, as the district court correctly noted, consumers have a substantial interest in knowing the alcohol content of beer. For example, many state statutes prohibit certain activities (such as driving) at or past a specific level of intoxication. Rec., vol. II, at 53. Consequently, restrictions on alcohol content disclosure are within the ambit of First Amendment protection.[2]

B.

Under the second prong of the *Central Hudson* test, we must assess the strength of the government's interest in regulating the disclosure of alcohol content. The legislative history introduced in evidence below reveals the Con-

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[2] The House argued below that alcohol content disclosure is inherently misleading. The district court rejected this contention. On appeal, the Justice Department, on behalf of defendants, has taken the position that "accurate and specific statements of alcohol content by Coors of its malt beverages" would not be misleading. Opening Brief of Defendants-Appellants at 15. The House has apparently abandoned its position that disclosure of malt beverage alcohol content *alone* is misleading and does not urge the position as a basis for reversal. *See* Opening Brief of Intervenor-Defendant-Appellant at 26-27 n. 16.

gressional interests underlying sections 205(e) and 205(f). The Federal Alcohol Administration Act (FAAA), which became law in 1935 shortly after the repeal of Prohibition, was designed as a comprehensive statute to deal with practices[3] within the alcohol beverage industry that Congress had judged to be unfair and deceptive, resulting in harm to both competitors and consumers. When reporting favorably to Congress on the FAAA, the House Ways and Means Committee summarized its conclusions with respect to alcohol content disclosure as follows:

> "The variation of alcoholic content has little consumer importance and the industry recognizes that attempts to sell beer and other malt beverages on the basis of alcoholic content are attempts to take advantage of the ignorance of the consumer and the psychology created by prohibition experiences.
>
> "Legitimate members of the industry have suffered seriously from unfair competition resulting from labeling and advertising that uses such terms as 'strong', 'extra strength', 'high test', 'high proof', 'pre-war strength', '14 percent original extract', and from brand names or other statements or references which include conspicuous numerals or symbols intending to suggest that the numerals or symbols represent the alcoholic content. Usually such representations of excess alcoholic content are false, but irrespective of their falsity, their abuse has grown to such an extent since repeal that the prohibition of all such statements is in the interest of the consumer and the promotion of fair competition."

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[3] In addition to the prohibitions at issue in this case, Congress enacted regulations restricting the use of exclusive outlets, 27 U.S.C. § 205(a), tied houses, § 205(b), and commercial bribery, § 205(c).

Federal Alcohol Administration Act: Hearings Before the Ways and Means Committee, HR8539, 74th Cong., 1st Sess. (1935). The legislation thus stemmed from the belief that withholding alcohol content information would benefit the consumer and promote fair competition within the industry.

Testimony given during Federal Alcohol Control Administration (FACA) hearings[4] confirms that one of the concerns underlying the movement to prohibit the disclosure of the alcohol content of malt beverages was that such disclosures tended to be misleading and were therefore subject to misuse. Testimony showed that accurate readings of alcohol content were difficult to obtain due to the "very peculiar" conditions of the brewing industry, namely that the malt crops and the atmospheric pressures and temperatures of fermenting cellars varied. Rec., vol. I, doc. 15, at 36-37. Given these problems, the alcohol content of beer could not be accurately measured and disclosed without allowing for a .4-.5 percent error of margin. *Id.* at 38-39. Testimony also suggested that not disclosing the alcohol content of malt beverages would relieve marketplace pressures to produce beer on the basis of alcohol content, resulting over the long term in beers with a lower alcohol content. *Id.* at 33.

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[4] FACA hearings were held just prior to the drafting and adoption of the FAAA on November 1, 1934. Federal Alcohol Regulations were a precursor to the FAAA. The FAAA Senate Report states:

> "The bill embodies in statutory form so much of the former code system as the committee now deems appropriate and within the constitutional power of Congress to enact."

S.Rep. No. 1215, 7th Cong., 17 [*sic*] Sess. 2 (1935). Because the drafters of the FAAA intended to adopt many FACA regulations, these hearings are relevant to congressional intent with respect to the FAAA. The hearings were introduced into evidence in the district court by Coors. *See* rec., vol. I, doc. 17, at 9 n. 5 (Plaintiff's Response to Motion for Summary Judgment), and rec., vol. I, docs. 15 and 16.

The legislative history reveals congressional concern regarding the effect of "strength wars" on brewers and the consuming public. In the FACA hearings, witnesses testified that statements of alcohol content on malt beverages should be prohibited to avoid this evil. Ralph W. Jackman of the Wisconsin State Brewers Association testified that labels displaying alcohol content resulted in a strength war wherein producers competed for market share by putting increasing amounts of alcohol in their beer. *See id.* at 34-38. Jackman testified that "the legitimate brewer does not desire to sell his beer on the basis of alcohol." *Id.* at 34. He said that brewers were unable to market beer on the basis of taste and flavor, however, because the practice of disclosing the alcohol content of malt beverages generally exerted market pressure on brewers to increase the alcohol content of their own products. *See id.* at 40. Alexander H. Bell, another representative of the brewing industry, echoed Mr. Jackman's testimony:

> "I have steadfastly urged that beer be sold as a beverage, with limited alcohol content, not as an intoxicant. That was followed for some little time by one of the local brewers here, till they found that in order to meet the competition it was necessary to increase the alcohol content of the beer to some extent."

Id. at 68. Jackman further testified that competitors in the marketplace would benefit because producing beer with a greater amount of alcohol was more costly. *See id.* at 35. Finally, industry witnesses testified that beer with a lower alcohol content would appease the "drys," who opposed drinking, and thus nondisclosure of alcohol content would benefit the industry as a whole.

The asserted government interest central to this case is the prevention of strength wars among the brewers. Congress believed that, in the long run, the market as regulated by section 205(e) and (f) would produce a lower alcohol beer for the benefit of the industry and the consuming public. The interests outlined above, as asserted, are substantial. It is a reasonable, legitimate legislative interest within Congress' commerce power to regulate the marketing of beer in interstate commerce to ensure fair competition, and to maintain moderate levels of alcohol in beer in order to protect the consumer from the otherwise unchecked "mistakes and excesses" of the brewing industry. *See* Opening Brief for the Defendants-Appellants at 4.[5]

In assessing the strength of the government's interests in withholding the alcohol content of the beers, the district court focused primarily on the validity of the asserted ends given the passage of time and changed circumstances. The court concluded that the factual circumstances that had given rise to the statute in 1935 no longer exist, and consequently, the statute no longer serves a substantial interest. The court first noted that because there are fewer brewers producing a large percentage of the market share, "it's very difficult for the court to see how there is any unfair competition or antitrust aspect to this." Rec., vol. II, at 52.

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[5] Contrary to Coors' contentions, the fact that Congress pursued non-commercial as well as commercial aims in enacting §§ 205(e) and 205(f) does not detract from either the legitimacy or substantiality of Congress' aims. *See infra* at 27. The noncommercial protective aims of this legislation are consistent with the Commerce Clause.

> "One permissible and particularly potent form of federal commerce regulation is the imposition of *protective conditions* on the privilege of engaging in activity that affects interstate commerce. . . . [T]he Supreme Court has consistently upheld congressional use of protective conditions to combat activities largely disfavored for largely noncommercial reasons."

Laurence Tribe, *Constitutional Law* § 5-6 at 311-12 (2d ed. 1988).

It is irrelevant that the circumstances giving rise to a particular piece of legislation have changed so long as the legislation continues to serve some valid and substantial government interest. *See Bolger v. Young Drug Prods.*, 463 U.S. 60, 71, 103 S.Ct. 2875, 2883, 77 L.Ed.2d 469 (1983); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 460, 98 S.Ct. 1912, 1920-12, 56 L.Ed.2d 444 (1978). The fact that the malt beverage industry and market have changed does not compel the conclusion that strength wars are no longer a real danger to the consuming public as well as to the brewers. The government argues that, in spite of changed circumstances, there is a continuing danger of strength wars similar to those that existed in 1935, as evidenced by Coors' advertising campaign, current market conditions, and consumer demand. *See* Opening Brief of Defendants-Appellants at 17-18. Coors' admission at oral argument that it desires to publish the alcohol content of its products to dispel Coors' image of being a "weak" beer testifies to the viability of the government's interest. *See* Testimony of Oral Argument. Nov. 6, 1990 (on file with Clerk of Court for Tenth Circuit). The House argues that the statute has continuing validity given that the emerging trend in the beer industry toward many small breweries may precipitate the strength war problems associated with the marketplace of 1935. Opening Brief of Intervenors-Defendants at 24 n. 51. Similarly, the government still asserts its interest in protecting the public against the "excesses" of the brewing industry. Opening Brief for Defendants-Appellants at 4, 22. Given all of these circumstances, it is apparent that the government has *asserted* a legitimate and substantial interest supporting the continuing validity of the legislation at issue.

C.

We next assess whether the regulation at issue "directly advances" the government's asserted interest. *See Central Hudson*, 447 U.S. at 566, 100 S.Ct. at 2351. Whether legislation "directly advances" the government's end requires us to focus on the relationship between the government's interest and the prohibition on speech. *Id.* at 569, 100 S.Ct. at 2353. There must be an "immediate connection" between the prohibition and the government's asserted end. *Id.* If the means-end connection is "tenuous" or "highly speculative", the regulation cannot survive constitutional scrutiny. *Id.*

We begin our analysis by noting that the record here does not unambiguously reflect a correct legislative judgment that the enacted means directly advance the intended ends. Unlike a number of cases in the commercial speech area, the link between advertising and strength wars is not self-evident. *See, e.g., Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 341-42, 106 S.Ct. 2968, 2976-77, 92 L.Ed.2d 266 (1986) (link between ban on gambling advertising and level of gambling self-evident); *Central Hudson*, 447 U.S. at 566, 100 S.Ct. at 2353 (link between advertising ban and sales self-evident); *Dunagin v. City of Oxford*, 718 F.2d 738, 747-49 & n. 8 (5th Cir. 1983) (link between advertising and increased alcohol use deemed self-evident; separate analysis of means-end connection therefore not conducted), *cert. denied*, 467 U.S. 1259, 104 S.Ct. 3553, 82 L.Ed.2d 855 (1984). In addition, this is not a case where we can defer to the legislature on the basis of precedent which already has established that the legislature's chosen means directly advances the asserted ends. *See, e.g., Metromedia v. City of San Diego*, 453 U.S. 490, 509 n. 14, 101 S.Ct. 2882, 2893 n. 14, 69 L.Ed.2d 800 (1981) (plurality relied on established line

of cases to ratify legislature's judgment that banning commercial billboards would improve traffic safety). On the other hand, we cannot agree with the district court that, as a matter of law, the government's asserted end is *not* directly advanced by the promotion on advertising the alcohol content of beer.

The party urging the prohibition on speech has the burden of justifying such a restriction. *See Board of Trustees v. Fox*, 492 U.S. 469, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989) (*Fox III*). In *Fox v. Board of Trustees*, 841 F.2d 1207, 1213 (2d Cir. 1988) (*Fox II*), the Second Circuit considered whether a prohibition placed on corporations conducting product demonstrations in campus dormitories directly advanced the University's interest in prevention of crime, protection against consumer exploitation, preservation of residential tranquility, and the promotion of education. The court of appeals concluded that the district court erred in assessing whether the legislation directly advanced the asserted governmental interests because it had only considered whether the legislative means were reasonably related to the legislative ends. *Id.* The appellate court rejected the district court's deferential review, stating:

> "The burden . . . shifts to the state not merely to assert that it has a substantial interest *but to demonstrate that interest by real evidence*. . . .
>
> "It is less clear, however, that the Regulation directly advances the State's interests; the Regulation cannot be sustained if it only provides 'ineffective or remote support for the government's purpose.' *Central Hudson*, 447 U.S. at 564, 100 S.Ct. at 2350. . . . *Whether SUNY offered sufficient evidence to meet its burden* is not evident as the district court considered only whether the Regulation was reasonably related to the asserted governmental interests, not whether it directly advanced them."

Id. (emphasis added).

In reviewing the Second Circuit's decision in *Fox II*, the Supreme Court held:

> "The Court of Appeals did not decide, however, whether Resolution 66-156 directly advances these interests, and whether the regulation it imposes is more extensive than is necessary for that purpose. . . . *We think that remand was correct, since further factual findings had to be made.*"

Fox III, 492 U.S. at 475-76, 109 S.Ct. at 3032-33 (emphasis added). The Supreme Court reversed the Second Circuit's decision with respect to the terms of the appellate court's remand order detailing how the "more extensive than necessary prong" of the analysis should be applied, but the Court did not further comment on the terms of the remand with respect to the "directly advance" prong. This tacit approval of the Second Circuit's approach to whether the legislative means "direct advance" the legislative ends comports with the Supreme Court's statement in *Fox III* that "the State bears the burden of justifying its restrictions." *Id.* at 480, 109 S.Ct. at 3034-35; *see also Linmark Assocs. v. Township of Willingboro*, 431 U.S. 85, 95-96, 97 S.Ct. 1614, 1619-20, 52 L.Ed.2d 155 (1977) (record evidence required to establish nexus between legislative ends and means); *cf. Dunagin*, 718 F.2d at 748 n. 8 (noting that particularized findings of fact should play a limited role in determining the constitutionality of any given statute).

Requiring the government to affirmatively demonstrate a nexus between its legislative means and ends may appear an undue judicial intrusion on the legislative function. *Fox III*, 492 U.S. at 478-81, 109 S.Ct. at 3033-35 (deference should be accorded governmental decision-makers). Nonetheless, the "directly advance" prong of the *Central Hudson* analysis compels a reviewing court to assess

whether the legislative ends are served by the legislative means: a determination that the legislature presumably made in enacting the legislation at issue. Therefore, we cannot simply assume that particular means will accomplish certain ends because the legislature presumed they would and enacted them into law.

In this case, Congress chose to regulate alcohol content disclosure in order to remove the pressure to produce malt beverages with ever-increasing alcohol content. Coors introduced, and the district court considered, evidence that the legislation as enacted now provides only "ineffective or remote support for the government's purpose." *Central Hudson*, 447 U.S. at 564, 100 S.Ct. at 2350; *see, e.g.*, rec., vol. II, at 22-24 and 29. In assessing whether the prohibition at issue directly advanced the government's ends, the district court did not have the benefit of *Fox III*. The court first looked at the issue in conjunction with whether Congress was pursuing a substantial end. *See* rec., vol. II, at 51-52. It then indicated it would merge its consideration of "directly advance" with its "less restrictive means" analysis:

> "Whether the governmental interest is directly advanced by the statute is an interesting question, because we still have the ability of the Bureau, BATF, to regulate, if this statute is declared unconstitutional, in violation of the First Amendment. We still have the opportunity for regulation to make sure that there is no misleading type of information given."

Id. at 53-54. As a consequence, the district court did not separately consider whether the facts presented by both sides presented a genuine issue of material fact on whether the legislative means *directly advanced* the legislative ends. The record before us demonstrates that there is a question of material fact. Summary judgment in favor of Coors was thus inappropriate.

D.

If the district court determines on remand that Congress' substantial interest in controlling strength wars among breweries is directly advanced by the regulation of alcohol-content advertising, it must then assess whether the absolute prohibition of such advertising is more extensive than necessary to serve the government's interest. Subsequent to the district court's decision in this case, the Supreme Court formulated a standard for the "no more extensive than necessary" element of the *Central Hudson* analysis:

> "*What our decisions require is a '"fit" between the legislature's ends and the means chosen* to accomplish those ends,'—a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served,' that employs *not necessarily the least restrictive means but*, as we have put it in the other contexts discussed above, *a means narrowly tailored to achieve the desired objective. . . .*
>
> "We reject the contention that the test we have described is overly permissive. It is far different, of course, from the 'rational basis' test used for Fourteenth Amendment equal protection analysis. There it suffices if the law could be thought to further a legitimate governmental goal, without reference to whether it does so at inordinate cost. Here *we require the government goal to be substantial, and the cost to be carefully calculated.*"

Fox III, 492 U.S. at 480, 109 S.Ct. at 3034-35 (citations omitted) (emphasis added). The Court placed the burden firmly on the government to demonstrate that restrictions were in proportion to the interest served: "Moreover, since the State bears the burden of justifying its restrictions, it

must affirmatively establish the reasonable fit we require." *Id.* (citation omitted).

The district court here concluded that the absolute prohibition of alcohol content advertising does not satisfy the fourth prong of the *Central Hudson* test because "there [could] be a much less extensive regulation carefully drawn to achieve the objectives that are argued for by the defendant intervenor in this case other than the flat prohibition." Rec., vol. II, at 54. Rendering its decision without the benefit of the precedent established by *Fox III*, the district court misperceived the nature of the "no more extensive than necessary" analysis. For a regulation of speech to pass constitutional muster, it need not be demonstrated that the government chose the least restrictive means; rather, the governmental goal must be "substantial" and the cost "carefully calculated." *Fox III*, 492 U.S. at 480, 109 S.Ct. at 3034-35. The Court in *Fox III* emphasized the limits of judicial review in this respect and the necessity of deferring to the legislature's judgment as to what "reasonable" means best effectuate the governmental end: "[W]e leave it to governmental decisionmakers to judge what manner of regulation may best be employed." *Id.* In addition, the Court stated that it chose not to adopt a least-restrictive-means requirement in order to "provide the Legislative and Executive Branches needed leeway in a field (commercial speech) 'traditionally subject to governmental regulation.' " *Id.* at 481, 109 S.Ct. at 3035 (quoting *Ohralik*, 436 U.S. at 455-56, 98 S.Ct. at 1918-19).

As discussed above, the government has asserted a substantial interest in preventing strength wars for the benefit of both consumers and producers. The possibility of less extensive means of regulation does not require the conclusion that the chosen means are impermissible. The legislative history here demonstrates that the legislature reasonably could have concluded that strength wars and

their attendant dangers could be eliminated by prohibiting alcohol content disclosure. *See Fox III*, 492 U.S. at 480, 109 S.Ct. at 3034-35; *San Francisco Arts & Athletics Inc. v. United States Olympic Comm.*, 483 U.S. 522, 539, 107 S.Ct. 2971, 2982, 97 L.Ed.2d 427 (1987); *Posadas de Puerto Rico Assocs.*, 478 U.S. at 344, 106 S.Ct. at 2978; *cf. Capital Broadcasting Co. v. Mitchell*, 333 F.Supp. 582, 585 (D.C.Cir. 1971) (three-judge court) ("Congress had convincing evidence that the Labeling Act of 1965 had not materially reduced the incidence of smoking"), *aff'd sub nom. Capital Broadcasting Co. v. Acting Attorney General*, 405 U.S. 1000, 92 S.Ct. 1289, 31 L.Ed.2d 472 (1972); *Dunagin*, 718 F.2d at 751 ("We do not believe that a less restrictive time, place and manner restriction, such as a disclaimer warning of the dangers of alcohol, would be effective. The state's concern is not that the public is unaware of the dangers of alcohol. . . . The concern instead is that advertising will unduly promote alcohol consumption despite known dangers").

The district court apparently concluded that the legislation currently fails the more-restrictive-than-necessary analysis because it represents an incorrect balance between the consumers' interest in having complete disclosure and the government's interest in preventing strength wars. *See* rec., vol. II, at 52-53. The court reasoned that because the government has a relatively insubstantial interest in preventing strength wars when compared to the consumers' countervailing interest in disclosure, the statute is unconstitutional. *Id.* Relevant case law suggests that a court may evaluate the competing interests in this manner to conclude that, as a constitutional matter, the ends cannot justify the scope of the regulation at issue. Thus, in *Fox III*, the Court stated that the scope of a regulation must be " 'in proportion to the interest served.' " 492 U.S. at 480, 109 S.Ct. at 3034-35 (citation omitted). In *Bolger*, 463

U.S. at 75, 103 S.Ct. at 2885, the court struck down a statute prohibiting the mailing of condom advertisements because the asserted interest of shielding recipients from offensive materials was insufficient to justify the suppression of speech. With respect to the governmental interest articulated in *Bolger,* the Court concluded:

> "Because the proscribed information 'may bear on one of the most important decisions' parents have a right to make, the restriction of 'the free flow of truthful information' constitutes a 'basic' constitutional defect regardless of the strength of the government's interest."

Id. at 75, 103 S.Ct. at 2885 (citation omitted). Similarly, in *Linmark Associates,* the Court concluded that the interest in ensuring racial integration could not, as a constitutional matter, justify the suppression of "for sale" signs on homes because the suppression weighed unfavorably against "one of the most important decisions [people] have a right to make: where to live and raise their families." 431 U.S. at 96, 97 S.Ct. at 1620.

However, neither relevant precedent nor the record in this case require the conclusion that the public's interest in information relating to alcohol content so outweighs the government's interest in nondisclosure as to render the statute unconstitutional. We have held that legislation prohibiting alcohol advertisements promotes a substantial interest in health and welfare, which otherwise would be adversely affected by alcohol consumption. *Oklahoma Telecasters Ass'n v. Crisp,* 699 F.2d 490, 498 (10th Cir. 1983), *rev'd on other grounds sub nom. Capital Cities Cables, Inc. v. Crisp,* 467 U.S. 691, 104 S.Ct. 2694, 81 L.Ed.2d 580 (1984). Similarly, in *Dunagin,* 718 F.2d at 747, the Fifth Circuit upheld a statute that significantly restricted liquor advertising by local media as a legitimate

way to avoid the undue promotion of alcohol consumption, in the interest of the public welfare.

Coors notes that the balance struck in favor of nondisclosure in *Oklahoma Telecasters* and *Dunagin* was altered by the fact the *state* legislatures had promulgated the statutes at issue pursuant to the authority granted them under the Twenty-first Amendment. Coors argues that because the regulation in this case was promulgated by *Congress,* the balance of interests weigh in favor of disclosure. Thus, in *Oklahoma Telecasters,* we stated that "when the Twenty-first Amendment is considered in addition to Oklahoma's substantial interest under its police power, the balance shifts in the state's favor, permitting regulation of commercial speech *that might otherwise not be permissible.*" 699 F.2d at 502 (emphasis added). In *Dunagin,* the Fifth Circuit upheld the validity of the advertising regulation noting that precedent establishing the state's special interest in regulating alcohol "help[ed] establish the balance in favor of the state." 718 F.2d at 750.

Oklahoma Telecasters does not require us to conclude that the federal government has no constitutional basis to substantiate its interest, or that the federal government's interest in regulating alcohol content disclosure is insufficient to justify a restraint on speech.[6] The Twenty-first Amendment did not completely abrogate Congressional power to regulate under the Commerce Clause. *See Arrow*

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[6] As demonstrated by the regulation itself, which is effective only if not contradicted by state law, Congress may have a less compelling interest than state legislatures in the labeling and advertising of the alcohol content of malt beverages. *See* 27 U.S.C. §§ 205(e) and 205(f). Because the statute at issue expressly states that alcohol content may not be disclosed unless required by state law, we need not address whether the holdings in *Oklahoma Telecasters* and *Dunagin* demonstrate that Congress has attempted to trump those powers expressly granted to the states by the Twenty-first Amendment.

Distilleries, Inc. v. Alexander, 109 F.2d 397 (7th Cir.) (FAAA not unconstitutional on ground that Twenty-first Amendment deprived Congress of power to enact interstate alcohol regulation), *cert. denied,* 310 U.S. 646, 60 S.Ct. 1095, 84 L.Ed. 1412 (1940); *see also South Dakota v. Dole,* 483 U.S. 203, 209, 107 S.Ct. 2793, 2797, 97 L.Ed.2d 171 (1987) (Twenty-first Amendment does not preclude Congress from indirectly establishing minimum drinking age by exercising its spending power); *Craig v. Boren,* 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976) (Twenty-first Amendment not *pro tanto* repeal of Commerce Clause, but merely requires that each provision "be considered in the light of the other, and in the context of the issues at stake in any concrete case"); *United States v. Frankfort Distilleries, Inc.,* 324 U.S. 293, 297-99, 65 S.Ct. 661, 663-65, 89 L.Ed. 951 (1945) (federal anti-trust prosecution of alcohol producers and distributors consistent with Twenty-first Amendment). We conclude that Congress has sufficient residual authority to regulate the marketplace for the benefit of consumers and producers under the Commerce Clause even though it may result in indirect regulation of alcohol. *See id.* Like the state legislatures in *Oklahoma Telecasters* and *Dunagin,* therefore, Congress may constitutionally regulate alcohol advertisements.

Coors makes a similar argument with respect to the decision rendered in *Posadas.* There, the Supreme Court stated that the advertising ban was permissible as "the greater power [of the state] to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling." 478 U.S. at 345-46, 106 S.Ct. at 2979. The Court did not state that the greater power to ban gambling was *necessary* to ban gambling advertising. The Court relied on the fact that Puerto Rico had the greater power to ban gambling to distinguish

Posadas from those cases that struck down regulations restricting information pertaining to constitutionally protected conduct.[7] *Id.* The Court also stated that finding Puerto Rico possessed the power to ban gambling advertisements was necessary to avoid the anomalous result of concluding that Puerto Rico had the police power to make gambling illegal but not to prohibit the advertising of gambling. *Id.* Consequently, Congress need not possess the greater power to completely regulate alcohol sales, a power expressly reserved to the states under the Twenty-first Amendment, in order to reconcile *Posadas* with the holding in this case that Congress can regulate alcohol advertisements consistent with the First Amendment.

III.

In sum, we hold that Coors' proposal to advertise the alcohol content of beer is commercial speech protected by the First Amendment, and that the public's interests in disclosure are significant. We also hold that the interests asserted by Congress and demonstrated in the legislative history are legitimate and substantial. We conclude that there are genuine issues of material fact underlying the question of whether the federal regulation of alcohol content advertising directly advances the government's asserted interest in preventing strength wars, and whether the complete prohibition of such advertising results in a "reasonable fit" between the legislature's goal and the means chosen to reach it, within the meaning of *Fox III.*

The district court judgment in favor of Coors is REVERSED and the case is REMANDED for further proceedings consistent with this opinion.

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[7] We note that the sale and consumption of alcohol are not constitutionally protected activities and can be prohibited.

APPENDIX C

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 87-Z-977

ADOLPH COORS COMPANY, PLAINTIFF

VS.

NICHOLAS BRADY, ET AL., DEFENDANTS

REPORTER'S TRANSCRIPT
(Trial to Court: Bench Ruling)

Proceedings before the HONORABLE ZITZ L. WEINSHIENK, Judge, United States District Court for the District of Colorado, commencing at 11:00 a.m., on the 28th day of October, 1992, in Courtroom C-502, United States Courthouse, Denver, Colorado.

APPEARANCES

BRADLEY, CAMPBELL, CARNEY & MADSEN, by K. PRESTON OADE, JR., 1717 Washington Avenue, Golden, Colorado, 80401, appearing for the plaintiff.

PATRICIA M. RUSSOTTO and ROBIN S. ROSENBAUM, Attorneys at Law, U.S. Department of Justice, Civil Division, 901 E Street, N.W., Room 912, Washington, D.C., 20530, appearing for the defendants.

[2] (The following proceedings were had and entered of record after the presentation of evidence and the arguments of counsel:)

THE COURTROOM DEPUTY: The matter now before the Court is Adolph Coors Company vs. Nicholas Brady, et al., Civil Action No. 87-Z-977.

THE COURT: Good afternoon.

Well, the first thing I would like to do is to thank the attorneys for a very well presented case, for your cooperation. There have been a few little glitches in that; but basically there has been good cooperation, and I appreciate it.

It's been most interesting. My conclusions today—my findings and conclusions, I propose to read into the record. I have taken to heart what you said about actually doing a written opinion and publishing, and I probably will do that within the next few weeks. But the opinion today will be in effect. And the published opinion will pretty much follow along what I am saying. It may expand a little bit and cite a few more cases.

We start with the Tenth Circuit opinion and in reversing the last decision that this court made, pointing the error of my ways to me, although I believe that *Fox III* had not been decided at the time that I made the last decision; but we do have the law clearly presented through the case *Fox III* that [3] has been referred to at length and the Tenth Circuit opinion.

The Tenth Circuit has told us that Coors' proposal to advertise alcoholic content is commercial speech and is protected by the First Amendment. They have also told us that the public interest in disclosure of alcoholic content is significant.

Now, in addition, the Tenth Circuit has concluded that there is some significant and legitimate and substantial interest by Congress in preventing strength wars; and this

has been demonstrated, they indicate, by the legislative history of Congress. So those are givens.

The issues that the circuit court has asked us to consider at this hearing are the following; and I'm reading now from page 1554 of the Tenth Circuit opinion. It's 944 F.2d 1543, *Adolph Coors Company v. Brady*, at page 1554:

"The question is whether the federal regulation of alcohol content directly advances the Government's asserted interest in preventing strength wars. A second question is whether the complete prohibition of such advertising results in a 'reasonable fit' between the legislature's goal and the means chosen to reach it within the meaning of *Fox III*."

Perhaps I should put on the record the cite of *Fox III; Board of Trustees v. Fox*, 492 United States 469, 1989 case.

Defendant's attorney argues that Congress makes the law. I couldn't agree more. Congress makes the law. But we [4] know from *Fox III* that a party who is urging prohibited—urging that commercial speech be prohibited has a burden of justifying it.

Now, the evidence in this case concerning strength wars relating to malt liquor is substantial and convinces this court that as to 27 United States Code 205 paragraph (f), which relates to advertising and which indicates that the prohibition is in the form of an exception which says that "except statements of or statements likely to be considered as statements of alcoholic content of malt beverages and wines are prohibited in advertising"—as to that statute, I am satisfied and convinced that the defendant has met its burden. The prohibition of advertising does advance the Government's legitimate interest in—as to strength wars and as to preventing strength wars. And I don't think that the plaintiff is in real dispute with this position.

Plaintiff agrees that ATF must regulate statements of alcoholic content in connection with advertising. Plaintiff also tells us in argument that Coors has no intention of marketing products based on alcoholic strength and is not asking for this. And I agree after hearing the evidence in this case that attempts to market alcoholic content as a product attribute are not legitimate attempts. They are contrary to substantial congressional policy.

Therefore, the Court determines after listening to the [5] evidence and the arguments of counsel that the statement in 27 United States Code section 205(f)(2) meets the test set forth in *Fox III* and in the Tenth Circuit opinion.

And this brings us to the more difficult question of whether the exception in the preceding subparagraph, 27 United States Code 205(e)(2), meets the test. The conclusion that I reach after carefully considering the testimony I've heard and the depositions that I've read is that it does not for this reason: No evidence that I have heard has convinced me that placing the alcoholic content on the can or other container will directly advance the Government's interest in preventing strength wars.

Now, the Tenth Circuit in their opinion spoke in terms of advertising; but it is important to note that subsection (e) refers to labeling. The content of alcohol on the can is not really advertising as we generally think of it, although in closing argument yesterday, Mr. Oade talked about whether a picture of a can, for example, of Coors beer with an alcoholic content listed on it could be advertised in the media, or would it have to sit down on a bed of flowers with the flowers or the decoration covering the alcoholic content.

I don't think I really have to decide that specific issue. I prefer to think of the issue that has been presented, and that appears to me to be clearly an issue for decision as a difference between the labeling of the alcoholic content on

the [6] container and the advertising of alcoholic content as an attribute of the beer and marketing it in that way.

So the two statutes that are before us actually spell out—one says "labeling" as a heading, the other says "advertising." The advertising one, as we've just discussed, stands. The labeling statute, from the evidence I've heard, does not meet the test. So even though the Tenth Circuit is talking in terms of advertising or uses the word "advertising," I'm going to consider that as meaning advertising and labeling.

Prohibiting the alcoholic content disclosure of malt beverages on labels has little, if anything, to do with the type of advertising that promotes strength wars. That is the conclusion I reach from listening to the testimony and reading the depositions.

In Canada, where alcoholic content is listed on the cans, there is no evidence of price (sic) wars; and although Defendant urges that because the beer in Canada may be slightly stronger in alcoholic content than the average beer in the United States that some inference should be drawn from this or raised, I disagree. First of all, it's a very small percentage; and there may be many other factors to account for why Canadians like their beer slightly stronger than Americans like their beer.

The question raised by the Tenth Circuit again is whether the regulation of speech passes constitutional muster, [7] or to use their language on page 1552 of their decision, "For regulation of speech to pass constitutional muster, it need not be demonstrated that the Government chose the least restrictive means; rather, the government goal must be substantial and the cost carefully calculated."

Now, the goal may be substantial in this case; but whether the means to that goal prohibiting the listing of the alcoholic content on a can or a bottle is necessary for the goal, whether the cost has been sufficiently calculated

in that prohibition, is what concerns the Court. The evidence that I have heard in this case does not show me that there is any real connection with this. The testimony of Mr. Gundee, for example, in talking about the survey in Canada, indicates that Canadians—more Canadians know the alcoholic content of the beer that they're drinking than American citizens, or the American beer drinkers. Canada of course, does allow content on labels.

The result of the goal—of the poll is that citizens, both in Canada and in the United States, drinkers, want to know the alcoholic content. They want the information; and the indication is they want it not to drink higher-alcohol beer but to be more responsible and for many to reduce the alcoholic content of what they're drinking. The testimony that I have heard has indicated to me that there is a trend, not a trend towards the malt liquors, which are the high end of the alcohol, but a trend towards the light beers, which are the low end. [8] And there are significant reasons why beer drinkers are interested in light beers, low calories, moderation, so that they can have perhaps a couple beers before they—with dinner, perhaps, before they step into a car and subject themselves to the laws of the various states relating to driving under the influence or driving while ability impaired. It's extremely important that they be able to know the content of what they're drinking. People do want this information. They want it to be responsible people, drinkers, the evidence has shown. They do not just want it to try to drink stronger beers.

The evidence shows that the high-strength brews do not have the same popular appeal as the low-strength and the light beers, either abroad or in the United States; and I refer to the depositions both of Mr. Ambler and Mr. Nelson.

In the deposition of Mr. Black, who has been with ATF many years, he indicates that he supports disclosure of alcoholic content. He would not be opposed to a change in the statute as long as ATF could regulate the advertising. And I think that's really the key. As long as the advertising does not promote "Buy a beer because it's stronger," quote/unquote, as long as ATF has a hand in the advertising, there is little danger of strength wars.

Basically, I could go through the testimony of all the witnesses I've heard, from Mr. Cates all the way through to Mr. Rechholtz, and none of the witnesses, none of the depositions [9] that I have read, no credible evidence that I have heard, lead me to believe that giving alcoholic content on labels will in any way promote strength—alcoholic strength wars, as long as ATF has the authority to regulate the use of this content in advertising.

And therefore, the Court concludes that subparagraph (e)—and we're again for the record talking about 27 U.S.C. section 205(e)(2) and the exception therein—does not make a reasonable fit, does not advance the government interest, and is an unconstitutional restraint on commercial speech.

Those regulations which pertain to (e) fall with the statute. Plaintiff has mentioned some of them, and I don't intend to, because I think by indicating that section (e) does not meet constitutional muster, the regulations that pertain to (e) fall by the way, although I strongly urge ATF—and I'm sure that Counsel will communicate this—to draft new regulations as soon as possible and as necessary to make sure that advertising is controlled, if this case is not going to be appealed, in any case. If it's not going to be appealed, I think we need the new regs right away.

I would also hope that Counsel could urge ATF to consider some uniform way of considering alcoholic content. I know we have heard testimony of percentage by weight,

percentage by volume; and it is confusing. It may be that because Canada and the other countries measure percentage by [10] volume, it may make sense for that to be a uniform way of measuring the alcoholic content of malt beverages in this country.

The Court intends to reduce these short remarks on the record to an opinion. We will publish it. It's going to be up to the defendant and perhaps in consultation not only with ATF but with Congress to decide whether in view of this decision, which is much more limited than my previous decision—whether there will or will not be an appeal. If there will be an appeal, I strongly urge cooperation on the appeal with both counsel, with all counsel.

And we are going to be turning back to both sides all exhibits that have been admitted, because we have no room to store them. And each attorney is going to have to keep in his or her possession the exhibits for the Tenth Circuit, especially if you are going to have an appeal. And the exhibits, for example, which were not admitted, although I think we ended up admitting almost all exhibits. And the depositions, as soon as I take all my sticky—stickies off of them—we'll give those back to you, too.

Now, any questions? Anything that you feel should be on the record as proposed findings or decisions?

MR. OADE: Your Honor, we would simply ask that the Court enter a permanent injunction against the defendants from enforcing these statutory provisions and the implementing [11] regulations and that that injunction be entered forthwith.

THE COURT: You're probably going to want some sort of a stay on that so that you can at least consider with your clients whether you need to appeal or not.

MS. RUSSOTTO: I believe there is an automatic ten-day stay in any event; but yes, we will certainly be considering whether or not we will be seeking a stay. I obviously

can't make any commitment in that regard at this point, but we will certainly be considering that over the next ten days.

THE COURT: How many days?

MS. RUSSOTTO: The next ten days. I believe the rule—the rule of civil procedure—I don't recall exactly which one it is now—mentions—

THE COURT: Well, you have 30 days to appeal.

MS. RUSSOTTO: I realize that, your Honor.

I think we have 60 days actually to appeal.

THE COURT: Pardon?

MS. RUSSOTTO: I think we have 60 days actually to appeal.

THE COURT: Oh, you're the Government. That's right.

MS. RUSSOTTO: In any event, we will be making a decision rather quickly whether or not to seek a stay.

THE COURT: All right. Today is the 28th of October and the Governmcnt—the defendant is asking for ten days to [12] consider this before any injunction go into effect. And I think that's reasonable, Mr. Oade. Your clients have waited a while; they can wait just a little longer.

How about the 9th? The Court will order that a permanent injunction against enforcing subsection (e) of 27 U.S.C. 205, or the exception therein—now, I'm not declaring the whole—Everyone understands that we're not talking about section (e) being unconstitutional. We're simply talking about the specific language, which is "except that statements of or statements likely to be considered as statements of alcoholic content of malt beverages are prohibited unless required by state law." And that's the end of it. I think that's the only language—that's the only language that I'm prohibiting.

MR. OADE: We understand that, you Honor; and I think the record is also clear that the implementing regulations that use words like "strong" or "extra strength"—we don't challenge those, either.

THE COURT: That's my understanding.

MR. OADE: The record is very clear on the scope of the relief sought in this case.

THE COURT: Those implementing regulations that you're mentioning are actually implementing regulations to the exception in (f), the advertising side, which I am not touching.

MR. OADE: We understand that, your Honor.

THE COURT: All right. The permanent injunction, then, [13] will go into effect on November 9, unless I hear something more by stipulation of the parties or unless there is something that is ordered in this case.

MS. RUSSOTTO: Very well.

THE COURT: Anything else that we need to put on the record?

MS. RUSSOTTO: We have no further remarks to make on the record, your Honor.

MR. OADE: We have nothing further, your Honor, except to thank the Court for your hard work and for reading all of those depositions.

THE COURT: There were a lot; and I didn't know I was going to be in trial as much, so it took a while. Let me also indicate, I think there is room here for some real discussion on whether this truly makes sense, because I sincerely feel that this is a solution that makes sense to everybody, including ATF. And rather than just appeal it for the purpose of appealing it, please talk together, think long and hard about it, because the First Amendment is important. And I think this perhaps takes care of the real problem which you sincerely have presented to the Court.

Okay. Thank you, and the Court is in recess.

(Thereupon, the trial was concluded and the Court recessed at 11:30 a.m.)

* * * * *

REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Dated at Denver, Colorado, this 28th day of October, 1992.

Paul A. Zuckerman

APPENDIX D

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 87-Z-977

ADOLPH COORS COMPANY, PLAINTIFF

VS.

JAMES BAKER, ET AL., DEFENDANTS

AND

SPEAKER AND BIPARTISAN LEADERSHIP GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES, INTERVENOR-DEFENDANTS

REPORTER'S TRANSCRIPT
(Hearing on Cross-Motions for Summary Judgment)

Proceedings before the HONORABLE ZITZ L. WEINSHIENK, Judge, United States District Court for the District of Colorado, commencing at 8:50 a.m., on the 31st day of May, 1989, in Courtroom C-204, United States Courthouse, Denver, Colorado.

APPEARANCES

BRADLEY, CAMPBELL, CARNEY & MADSEN, by K. PRESTON OADE, Attorney at Law, 171 Washington Avenue, Golden, Colorado, 80401-1994, appearing for the plaintiff.

MICHAEL J. NORTON, Acting United States Attorney, by

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RULING

THE COURT: The briefing and the arguments today have pinpointed what is a very interesting issue, and that is the constitutionality based on a First Amendment challenge to two [47] small parts of a statute, very specifically the exception clauses within the parentheses of 27 United States Code 205(e)(2) and 205(f)(2). And we're not talking, as I understand, about the whole of (e) and (f) or even (e)(2) or (f)(2), but rather just the parenthetical clause within those two subsections, which state, reading from the one in (e)(2), ". . . except that statements of or

statements likely to be considered as statements of alcoholic content of malt beverages are prohibited unless required by state law and except that—" whoops. We're talking about wines. So we're not even talking about the whole exception clause. We're only talking about that part of the exception clause that refers to malt beverages, not the part that refers to wines.

And let me just take a look at—Under (f)(2), the exception clause ". . . except the statements of or statements likely to be considered of alcoholic content of malt beverages and wines"; and in this case, we're concerned only with malt beverages. So what we're talking about is whether that prohibition on limiting alcoholic content of malt beverages contained within those two parenthetical exceptions to 27 U.S.C. 205(e)(2) and (f)(2) can stand constitutional muster.

This case arose because Plaintiff, Adolph Coors Company, desired certain advertising or packaging on their product and went to the Bureau of Alcohol, Tobacco, and Firearms, BATF, for approval. BATF refused approval because of [48] the statute in question, however agreed with the plaintiff that the statutory prohibition against listing any alcoholic content of beer was unconstitutional.

We then had the intervenor defendant step into the case to create a case or controversy. The intervenor defendant is the Speaker and Bipartisan Leadership Group of the U.S. House of Representatives, representing the leadership of the House and I presume the House of Representatives—

MS. JARUZELSKI: Yes, that's our institutional mechanism.

THE COURT: —through the leadership.

This intervenor defendant has made a very forceful argument that the Court should not interfere with a statute, even a statute passed by Congress 50-odd years

ago, and declare it unconstitutional unless the ruling was compelling. And basically, the argument has been made very forcefully by Defendant that the Court should not interfere with the legislative decisions made by Congress. However, if a statute is in violation of the First Amendment, whether it be a Federal statute or state statute, the only way that that ruling can be made is by the judicial branch, by the court, unless Congress itself chooses to amend or to repeal the statute, which Congress has not done in this case.

The pivotal case, the important case for decision of whether a statute violates the First Amendment protections [49] concerning commercial speech is *Central Hudson Gas & Electric v. Public Service Commission,* which is 447 U.S. 557, a 1980 Supreme Court decision. In that decision, the Supreme Court said the following, and I'm reading now from page 566 of the decision:

"In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted and whether it is not more extensive than is necessary to serve that interest."

And thus, in 1980, the Supreme Court set forth the landmark case in the commercial speech area which establishes this four-part test and requires a court to do a balancing test, to consider the factors that are set forth by the Supreme Court.

First factor: Does the commercial message accurately inform the public about lawful activity in a manner that is

not misleading, or as stated by the Supreme Court, does it concern lawful activity and is not misleading?

I've listened carefully to the arguments of Counsel; and it appears to the Court that the argument stated by the—or [50] stated in the amicus brief has some merit. What is misleading, it appears to the Court, is the status quo, rather than a truthful statement about alcoholic content. It is very difficult for this court to see how a truthful statement can be misleading. Mere disclosure of the alcoholic content cannot be deceptive almost by definition.

I think what is being argued by Intervenor Defendant is that the manner of the disclosure can be deceptive, but the manner of disclosure of the alcoholic content certainly is subject to appropriate regulations which can prevent misleading information or prevent false impressions that people can drink more or that insignificant percentages are significant.

The legislative hearings that have been discussed in argument were hearings that took place in the 30's, approximately a year after Prohibition was ended; and the conditions in the 1930's, a short period after prohibition, is certainly not the condition of the present time, the 1980's:

We have—we have modern brewing technologies—This has been pointed out, and I think there is no dispute over this—in the present day, where the percentage can be very clearly pinpointed. In the 1930's, there were 680-some brewers. Today, 90 percent of the malt liquor is made by 5 breweries; and we have other very substantial differences between the 30's and the 80's, the late 80's, because today with the importance of automobiles and the desire of drivers to be responsible [51] drinkers and to know how much alcohol they are drinking, there is certainly a very strong reason for making information available so that

citizens will be able to judge how much alcoholic intake they have, if they're going to be driving a car.

I would note that the point made in the amicus brief is compelling that the differences between having some light beer, for example, with little alcoholic content, and malt liquor, with heavy alcoholic content, might make all the difference between a driver being not at all affected by a social drink and a driver being unable to operate a vehicle. And this is a very powerful and persuasive reason why the status quo of not allowing consumers to know the alcoholic content is what is misleading, rather than a truthful statement.

In looking at the first prong, then, of the *Hudson* test, there certainly would be—it certainly would be lawful activity to advise the consumer about alcoholic content in beverages, malt beverages; and it certainly would not be misleading simply to list the alcoholic content.

I would just simply note that alcoholic content is listed as far as wines are concerned and at least by proof in hard liquor.

We then go to the second test of *Central Hudson,* and that is whether the asserted government interest is substantial. And perhaps that should be considered with the third test, [52] which is whether the regulation or in this case, the statute, directly advances the governmental interest.

Do we have a substantial governmental interest in preventing consumers from knowing the alcoholic content? And it appears to the court that the answer has to be no. It's very difficult for the Court to see how there is any unfair competition or antitrust aspect to this. We do not have the same fair competition problems that existed in the 30's; and of course, this court must look to the present time and the present situation in looking at these tests in *Hudson.*

Under the present situation, with fewer brewers producing a large percentage of the market, we certainly don't have the same situation as the 1930 situation of 680-plus brewers brewing beers in small factories, and so forth. Fair competition, I have to agree with the plaintiff, is really not an interest.

Consumer deception? I've already mentioned this on the first prong; and it appears to me that in the 80's, we have knowledgeable consumers, we have consumers who have an interest in knowing alcoholic content, not just because of mere curiosity but because of the very important advent of the automobile and other forms of transportation. I might mention that we have skiing statutes which indicate that skiers, for example, should ski safely; and that means without having an over amount of alcohol in their bodies when they are skiing, so [53] they don't ski recklessly.

Alcohol content is important for consumers to know in many different respects; and this is something, even though I will agree that the plaintiff cannot assert the positions of the consumer because they're not representing the consumer, the Court can simply—can certainly consider the present state of affairs as far as what consumers need to know. The status quo, which does not let a consumer know the difference between alcoholic content of light beers and very strong malt liquor, for example, has to be more deceiving than letting this information be available to the public.

I realize that state statutes do control in many, if not most states, concerning the light beers. But we do have states such as Washington, who are not asserting that right to control under the general welfare; and in the State of Washington and other states, certainly this problem lloms [*sic*]. But in this present day of the automobile, where it is important for the consumer to understand what they are drinking and where indeed the driver's tests in many states

check new drivers to make sure they understand the laws and understand how much alcohol is usually contained in beer, wine, and more potent drinks, it is important for consumers to be able to see what alcoholic content is.

Whether the governmental interest is directly advanced by the statute is an interesting question, because we still [54] have the ability of the Bureau, BATF, to regulate, if this statute is declared unconstitutional, in violation of the First Amendment. We still have the opportunity for regulation to make sure that there is no misleading type of information given.

I understand the argument that this could be misleading, but the point is I think that it isn't the disclosure of the alcoholic content which is misleading but the manner in which it is disclosed; and that certainly can be regulated by much less extensive prohibition.

And that takes us to the fourth point of *Hudson,* which is that as stated by the Supreme Court: whether it is not more extensive than is necessary to serve that interest. The statutory prohibition says no listing unless by state law. It says alcoholic content of malt beverages is prohibited unless required by state law. Certainly there can be a much less extensive regulation carefully drawn to achieve the objectives that are argued by the defendant intervenor in this case other than the flat prohibition.

I see none of the cases that have been cited by Intervenor Defendant which convinces this court that the decision should go otherwise. There have been cases cited, a Fifth Circuit case I had a chance to look at. It concerns the use of the term "realtor" and whether that term can be used and limited to members of the board of the national association of realtors. That really is a case which is far different, and [55] regulation by the state there is far different than what we're talking about here.

Experience in Canada, which is a neighboring country, which has a lot of similarities – it's not identical, of course, to the United States but has a lot of similarities – is important. And the plaintiff has pointed out that Canada has not regulated alcoholic content by prohibiting it and that indeed the – I think it appears to be unrebutted that the trend in Canada is towards lower alcoholic content of beer and not greater. And it is urged that consumers knowing the alcoholic content of beer may tend to drink the lower alcoholic content: the whole trend toward light beers, for example. So even though the Canadian experience is not determinative, nevertheless I think it may be shown that the great specters of all the bad things that can happen if this small exception in the statute is stricken are merely specters and will not necessarily come to be; and Canada and other countries are pointed to as examples that this is not the case in countries which do not have this prohibition.

The Court is satisfied that the – in examining the test in *Central Hudson* that this very small part of the statute, the exception clause within the parentheses referring to malt liquors in these two subsections stands as an unconstitutional restraint on commercial speech under the test in *Hudson* and shall not be enforced.

[56] The case came to be because Coors asked BATF to approve certain labeling; and at this time, the parties are just Coors for the plaintiff, BATF as the defendant, and of course, the defendant intervenor, who is asserting the interest of the House of Representatives. But I have no problem in declaring today that the statute constitutes an unconstitutional restraint on commercial speech and that it may not be enforced, it shall not be enforced.

And again, I want to make very clear that when we're talking about the statute, we're talking about the excep-

tional—the exception within the parentheses referring to malt beverages contained in 27 U.S.C. 205(e)(2) and (f)(2). And it's only that limited amount of wording within the exception clause referring to malt beverages.

May I inquire, because we only have parties at this time of Coors, BATF, and of course the House of Representatives—may I inquire whether there—are you asking that this order be—I'm not sure what the—how broadly this order should be stated. I have no problem in saying that it shall not be in force as to Coors and BATF can go ahead and consider whether their label is proper. But we certainly don't have other breweries included with the plaintiff.

MR. OADE: Your Honor, I believe if it's unconstitutional, the BATF cannot enforce it against anybody; and that's the relief that we asked for in our complaint, and [57] we just ask that they consider our application on the merits and anybody else's as well, your Honor.

THE COURT: Well, they obviously have to consider your application on the merits. It's very difficult to see how the statute can be an unconstitutional restraint on commercial speech and not be enforced against you but can be enforced against others.

MR. OADE: That's what we asked for in our complaint: that it be declared unconstitutional and the BATF be enjoined from enforcing 205(e)(2) and 205(f)(2).

THE COURT: I think you have to be again careful, because 205(e)(2) and 205(f)(2) are broader than what I am declaring as an unconstitutional restraint.

MR. OADE: Insofar as it prohibits the advertisement of percentage alcohol content of malt beverages and statements on the label.

THE COURT: That is correct.

MR. OADE: Yes.

THE COURT: Did you want to respond in any way?

MS. JARUZELSKI: Our only response would be to call to the Court's attention that it is clear that to the extent this is enjoined, it's enjoined in this jurisdiction; and while that would be the law of this jurisdiction, this court does not have power to enforce a nationwide ban. And that's clear from, for example, the *Amaron* case, which came up through the District [58] Court in New Jersey to the Third Circuit and ultimately to the Supremes.

THE COURT: I'm not sure I agree with you. This is a Federal Court. Coors is a Federal brewer selling throughout all 50 states and perhaps—and I'm sure abroad, although we're not talking about international sales. But my decision applies as far as Coors is concerned, as far as BATF is concerned, nationwide.

MS. JARUZELSKI: I would respectfully disagree, your Honor, but—

THE COURT: I don't see how you can possibly argue that it's limited only to Colorado, when the sales of Coors are nationwide and this is a national statute or a Federal statute, not a state statute.

MS. JARUZELSKI: I can only say that that has been the position that has been taken in other cases where district courts have tried to enjoin Federal agencies nationwide.

THE COURT: Well, we have the attorney sitting in court representing—the local attorney representing BATF; and my order will be that BATF shall not enforce this unconstitutional restraint concerning Coors; and as far as I'm concerned, that's—that has to be nationwide. I frankly feel that it should not be enforced, since I'm declaring it unconstitutional.

Assuming this is going to be appealed and there is [59] going to be a circuit decision that's going to look at it and assuming that the circuit agrees with me, it would be an absolutely impossible situation for BATF to enforce this as to one brewer and not as to others.

Mr. Pharo, I don't know if you have a position on this or not.

MR. PHARO: Well, your Honor, I think courts throughout the country that have jurisdiction over the government enjoin action, and it's normally nationwide; so that would be my guess, would be that your order would be enforceable or declare it unconstitutional as to all brewers and it would be nationwide.

THE COURT: Well, maybe I should make a decision on this. I was going to hear the comments of the parties, but it seems to me that it's an absolutely impossible situation to declare something unconstitutional just as to a certain area or as to a certain brewer; and the Court therefore will order that this statute is unconstitutional as a restraint on commercial speech, the limited part of the statute that I've previously described, and that it shall not be enforced by BATF. And we'll certainly allow the intervenor defendant to appeal this decision, and I welcome Tenth Circuit inquiry into it.

I may very well reduce this verbal decision to writing within the next week or two, and I will send copies of it to all concerned. But the decision will be effective as of today, [60] and what I've said on the record will be incorporated by reference as if fully set forth and stands as the declaratory judgement of the Court.

I want to thank the attorneys. It's been very interesting, and I appreciate the briefs and the very excellent argument. I don't know if we have anyone present from Heileman Brewery, but the amicus brief that Heileman did was also very helpful.

MR. OADE: Thank you, your Honor; and I'll thank Heileman on behalf of the Court.

THE COURT: Okay. If there is nothing further, we'll take a short recess and then come back and call up the next case.

(Thereupon, the hearing was concluded and the Court recessed at 10:50 a.m.)

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 92-1348

ADOLPH COORS COMPANY, PLAINTIFF-APPELLEE

v.

NICHOLAS BRADY, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF TREASURY; STEVE HIGGINS, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, DEFENDANT-APPELLANTS

AND

SPEAKER AND BIPARTISAN LEADERSHIP GROUP OF THE U.S. HOUSE OF REPRESENTATIVES, INTERVENOR-DEFENDANT-APPELLANT

Entered December 1, 1993

ORDER

Before MCKAY, Chief Judge, BARRETT, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL and KELLY, Circuit Judges, and BROWN* District Judge.

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* Honorable Wesley E. Brown, Senior District Judge, United States District Court for the District of Kansas, sitting by designation.

This matter comes on for consideration of appellants' petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court
ROBERT L. HOECKER, Clerk

By /s/ Patrick Fisher

PATRICK FISHER
Chief Deputy Clerk

APPENDIX F

STATUTORY PROVISIONS

Title 27:

§ 205. Unfair competition and unlawful practices

It shall be unlawful for any person engaged in business as a distiller, brewer, rectifier, blender, or other producer, or as an importer or wholesaler, of distilled spirits, wine, or malt beverages, or as a bottler, or warehouseman and bottler, of distilled spirits, directly or indirectly or through an affiliate:

(a) Exclusive outlet

To require, by agreement or otherwise, that any retailer engaged in the sale of distilled spirits, wine, or malt beverages, purchase any such products from such person to the exclusion in whole or in part of distilled spirits, wine, or malt beverages sold or offered for sale by other persons in interstate or foreign commerce, if such requirement is made in the course of interstate or foreign commerce, or if such person engages in such practice to such an extent as substantially to restrain or prevent transactions in interstate or foreign commerce in any such products, or if the direct effect of such requirement is to prevent, deter, hinder, or restrict other persons from selling or offering for sale any such products to such retailer in interstate or foreign commerce; or

(b) "Tied house"

To induce through any of the following means, any retailer, engaged in the sale of distilled spirits, wine, or malt beverages, to purchase any such products from such person to the exclusion in whole or in part of distilled spirits, wine, or malt beverages sold or offered for sale by other persons in interstate or foreign commerce, if such

inducement is made in the course of interstate or foreign commerce, or if such person engages in the practice of using such means, or any of them, to such an extent as substantially to restrain or prevent transactions in interstate or foreign commerce in any such products, or if the direct effect of such inducement is to prevent, deter, hinder, or restrict other persons from selling or offering for sale any such products to such retailer in interstate or foreign commerce: (1) By acquiring or holding (after the expiration of any existing license) any interest in any license with respect to the premises of the retailer; or (2) by acquiring any interest in real or personal property owned, occupied, or used by the retailer in the conduct of his business; or (3) by furnishing, giving, renting, lending, or selling to the retailer, any equipment, fixtures, signs, supplies, money, services, or other thing of value, subject to such exceptions as the Secretary of the Treasury shall by regulation prescribe, having due regard for public health, the quantity and value of articles involved, established trade customs not contrary to the public interest and the purposes of this subsection: or (4) by paying or crediting the retailer for any advertising, display, or distribution service; or (5) by guaranteeing any loan or the repayment of any financial obligation of the retailer; or (6) by extending to the retailer credit for a period in excess of the credit period usual and customary to the industry for the particular class of transactions, as ascertained by the Secretary of the Treasury and prescribed by regulations by him; or (7) by requiring the retailer to take and dispose of a certain quota of any of such products; or

(c) Commercial bribery

To induce through any of the following means, any trade buyer engaged in the sale of distilled spirits, wine, or malt beverages, to purchase any such products from such person to the exclusion in whole or in part of distilled

spirits, wine, or malt beverages sold or offered for sale by other persons in interstate or foreign commerce, if such inducement is made in the course of interstate or foreign commerce, or if such person engages in the practice of using such means, or any of them, to such an extent as substantially to restrain or prevent transactions in interstate or foreign commerce in any such products, or if the direct effect of such inducement is to prevent, deter, hinder, or restrict other persons from selling or offering for sale any such products to such trade buyer in interstate or foreign commerce: (1) By commercial bribery; or (2) by offering or giving any bonus, premium, or compensation to any officer, or employee, or representative of the trade buyer; or

(d) Consignment sales

To sell, offer for sale, or contract to sell to any trade buyer engaged in the sale of distilled spirits, wine, or malt beverages, or for any such trade buyer to purchase, offer to purchase, or contract to purchase, any such products on consignment or under conditional sale or with the privilege of return or on any basis otherwise than a bona fide sale, or where any part of such transaction involves, directly or indirectly, the acquisition by such person from the trade buyer or his agreement to acquire from the trade buyer other distilled spirits, wine, or malt beverages—if such sale, purchase, offer, or contract is made in the course of interstate or foreign commerce, or if such person or trade buyer engages in such practice to such an extent as substantially to restrain or prevent transactions in interstate or foreign commerce in any such products of if the direct effect of such sale, purchase, offer, or contract is to prevent, deter, hinder, or restrict other persons from selling or offering for sale any such products to such trade buyer in interstate or foreign commerce: *Provided,* That this

subsection shall not apply to transactions involving solely the bona fide return of merchandise for ordinary and usual commercial reasons arising after the merchandise has been sold; or

(e) Labeling

To sell or ship or deliver for sale or shipment, or otherwise introduce in interstate or foreign commerce, or to receive therein, or to remove from customs custody for consumption, any distilled spirits, wine, or malt beverages in bottles, unless such products are bottled, packaged and labeled in comformity with such regulations, to be prescribed by the Secretary of the Treasury, with respect to packaging, marking, branding, and labeling and size and fill of container (1) as will prohibit deception of the consumer with respect to such products or the quantity thereof and as will prohibit, irrespective of falsity, such statements relating to age, manufacturing processes, analyses, guarantees, and scientific or irrelevant matters as the Secretary of the Treasury finds to be likely to mislead the consumer; (2) as will provide the consumer with adequate information as to the identity and quality of the products, the alcoholic content thereof (except that statements of, or statements likely to be considered as statements of alcoholic content of malt beverages are prohibited unless required by State law and except that, in case of wines, statements of alcoholic content shall be required only for wines containing more than 14 per centum of alcohol by volume), the net contents of the package, and the manufacturer or bottler or importer of the produce; (3) as will require an accurate statement, in the case of distilled spirits (other than cordials, liqueurs, and specialties) produced by blending or rectification, if neutral spirits have been used in the production thereof, informing the consumer of the percentage of neutral

spirits so used and of the name of the commodity from which such neutral spirits have been distilled, or in case of neutral spirits or of gin produced by a process of continuous distillation, the name of the commodity from which distilled; (4) as will prohibit statements on the label that are disparaging of a competitor's products or are false, misleading, obscene, or indecent; and (5) as will prevent deception of the consumer by use of a trade or brand name that is the name of any living individual of public prominence, or existing private or public organization, or is a name that is in simulation or is an abbreviation thereof, and as will prevent the use of a graphic, pictorial, or emblematic representation of any such individual or organization, if the use of such name or representation is likely falsely to lead the consumer to believe that the product has been indorsed, made, or used by, or produced for, or under the supervision of, or in accordance with the specifications of, such individual or organization: *Provided,* That this clause shall not apply to the use of the name of any person engaged in business as a distiller, brewer, rectifier, blender, or other producer, or as an importer, wholesaler, retailer, bottler, or warehouseman, of distilled spirits, wine, or malt beverages, nor to the use by any person of a trade or brand name used by him or his predecessor in interest prior to August 29, 1935; including regulations requiring, at time of release from customs custody, certificates issued by foreign governments covering origin, age, and identity of imported products: *Provided further,* That nothing herein nor any decision, ruling, or regulation of any Department of the Government shall deny the right of any person to use any trade name or brand of foreign origin not presently effectively registered in the United States Patent and Trademark Office which has been used by such person or predecessors in the United

States for a period of at least five years last past, if the use of such name or brand is qualified by the name of the locality in the United States in which the product is produced, and, in the case of the use of such name or brand on any label or in any advertisement, if such qualification is as conspicuous as such name or brand.

It shall be unlawful for any person to alter, mutilate, destroy, obliterate, or remove any mark, brand, or label upon distilled spirits, wine, or malt beverages held for sale in interstate or foreign commerce or after shipment therein, except as authorized by Federal law or except pursuant to regulations of the Secretary of the Treasury authorizing relabeling for purposes of compliance with the requirements of this subsection or of State law.

In order to prevent the sale or shipment or other introduction of distilled spirits, wine, or malt beverages in interstate or foreign commerce, if bottled, packaged, or labeled in violation of the requirements of this subsection, (1) no bottler of distilled spirits, no producer, blender, or wholesaler of wine, or proprietor of a bonded wine storeroom, and no brewer or wholesaler of malt beverages shall bottle, and (2) no person shall remove from customs custody, in bottles, for sale or any other commercial purpose, distilled spirits, wine, or malt beverages, respectively, after such date as the Secretary of the Treasury fixes as the earliest practicable date for the application of the provisions of this subsection to any class of such persons (but not later than August 15, 1936, in the case of distilled spirits, and December 15, 1936, in the case of wine and malt beverages, and only after thirty days' public notice), unless, upon application to the Secretary of the Treasury, he has obtained and has in his possession a certificate of label approval covering the distilled spirits, wine, or malt beverages, issued by the Secretary in such manner and

form as he shall by regulations prescribe: *Provided,* That any such bottler of distilled spirits, or producer, blender, or wholesaler of wine, or proprietor of a bonded wine storeroom, or brewer or wholesaler of malt beverages shall be exempt from the requirements of this subsection if, upon application to the Secretary, he shows to the satisfaction of the Secretary that the distilled spirits, wine, or malt beverages to be bottled by the applicant are not to be sold, or offered for sale, or shipped or delivered for shipment, or otherwise introduced, in interstate or foreign commerce. Officers of internal revenue are authorized and directed to withhold the release of distilled spirits from the bottling plant unless such certificates have been obtained, or unless the application of the bottler for exemption has been granted by the Secretary; and customs officers are authorized and directed to withhold the release from customs custody of distilled spirits, wine, and malt beverages, unless such certificates have been obtained. The District Courts of the United States, and the United States court for any Territory shall have jurisdiction of suits to enjoin, annul, or suspend in whole or in part any final action by the Secretary upon any application under this subsection; or

(f) Advertising

To publish or disseminate or cause to be published or disseminated by radio broadcast, or in any newspaper, periodical or other publication or by any sign or outdoor advertisement or any other printed or graphic matter, any advertisement of distilled spirits, wine, or malt beverages, if such advertisement is in, or is calculated to induce sales in, interstate or foreign commerce, or is disseminated by mail, unless such advertisement is in conformity with such regulations, to be prescribed by the Secretary of the Treasury, (1) as will prevent deception of the consumer

with respect to the products advertised and as will prohibit, irrespective of falsity, such statements relating to age, manufacturing processes, analyses, guaranties, and scientific or irrelevant matters as the Secretary of the Treasury finds to be likely to mislead the consumer; (2) as will provide the consumer with adequate information as to the identity and quality of the products advertised, the alcoholic content thereof (except the [*sic*] statements of, or statements likely to be considered as statements of, alcoholic content of malt beverages and wines are prohibited), and the person responsible for the advertisement; (3) as will require an accurate statement, in the case of distilled spirits (other than cordials, liqueurs, and specialties) produced by blending or rectification, if neutral spirits have been used in the production thereof, informing the consumer of the percentage of neutral spirits so used and of the name of the commodity from which such neutral spirits have been distilled, or in case of neutral spirits or of gin produced by a process of continuous distillation, the name of the commodity from which distilled; (4) as will prohibit statements that are disparaging of a competitor's products or are false, misleading, obscene, or indecent; (5) as will prevent statements inconsistent with any statement on the labeling of the products advertised. This subsection shall not apply to outdoor advertising in place on June 18, 1935, but shall apply upon replacement, restoration, or renovation of any such advertising. The prohibitions of this subsection and regulations thereunder shall not apply to the publisher of any newspaper, periodical, or other publication, or radio broadcaster, unless such publisher or radio broadcaster is engaged in business as a distiller, brewer, rectifier, or other producer, or as an importer or wholesaler, of distilled spirits, wine, or malt beverages, or as a bottler, or

warehouseman and bottler, of distilled spirits, directly or indirectly or through an affilite.

The provisions of subsections (a), (b), and (c) of this section shall not apply to any act done by an agency of a State or political subdivision thereof, or by any officer or employee of such agency.

In the case of malt beverages, the provisions of subsections (a), (b), (c), and (d) of this section shall apply to transactions between a retailer or trade buyer in any State and a brewer, importer, or wholesaler of malt beverages outside such State only to the extent that the law of such State imposes similar requirements with respect to similar transactions between a retailer or trade buyer in such State and a brewer, importer, or wholesaler of malt beverages in such State, as the case may be. In the case of malt beverages, the provisions of this subsection and subsection (e) of this section shall apply to the labeling of malt beverages sold or shipped or delivered for shipment or otherwise introduced into or received in any State from any place outside thereof, or the advertising of malt beverages intended to be sold or shipped or delivered for shipment or otherwise introduced into or received in any State from any place outside thereof, only to the extent that the law of such State imposes similar requirements with respect to the labeling or advertising, as the case may be, of malt beverages not sold or shipped or delivered for shipment or otherwise introduced into or received in such State from any place outside thereof.

The Secretary of the Treasury shall give reasonable public notice, and afford to interested parties opportunity for hearing, prior to prescribing regulations to carry out the provisions of this section.

APPENDIX G

REGULATORY PROVISIONS

27 C.F.R.:

§ 7.26. Alcoholic content.

(a) The alcoholic content and the percentage and quantity of the original extract shall not be stated unless required by State law. When alcoholic content is required to be stated, but the manner of statement is not specified in the State law, it shall be stated in percentage of alcohol by weight or by volume, and not by proof or by maximums or minimums. Otherwise the manner of statement shall be as specified in the State law.

(b) The terms 'low alcohol" or "reduced alcohol" may be used only on malt beverage products containing less than 2.5 percent alcohol by volume.

(c) The term "non-alcoholic" may be used on malt beverage products, provided the statement "contains less than 0.5 percent (or .5%) alcohol by volume" appears in direct conjunction with it, in readily legible printing and on a completely contrasting background.

(d) The term "alcohol-free" may be used only on malt beverage products containing no alcohol.

* * * * *

§ 7.29 Prohibited practices.

(a) *Statements on labels.* Containers of malt beverages, or any labels on such containers, or any carton, case, or individual covering of such containers, used for sale at retail or any written, printed, graphic, or other matter accompanying such containers to the consumer shall not contain:

(1) Any statement that is false or untrue in any particular, or that, irrespective of falsity, directly, or by am-

biguity, omission, or inference, or by the addition of irrelevant, scientific or technical matter, tends to create a misleading impression.

(2) Any statement that is disparaging of a competitor's products.

(3) Any statement, design, device, or representation which is obscene or indecent.

(4) Any statement, design, device, or representation of or relating to analyses, standards, or tests, irrespective of falsity, which the Director finds to be likely to mislead the consumer.

(5) Any statement, design, device, or representation of or relating to any guarantee, irrespective of falsity, which the Director finds to be likely to mislead the consumer. Money-back guarantees are not prohibited.

(6) A trade or brand name that is the name of any living individual of public prominence, or existing private or public organization, or is a name that is in simulation or is an abbreviation thereof, or any graphic, pictorial, or emblematic representation of any such individual or organization, if the use of such name or representation is likely falsely to lead the consumer to believe that the product has been endorsed, made, or used by, or produced for, or under the supervision of, or in accordance with the specifications of, such individual or organization: *Provided,* That this paragraph shall not apply to the use of the name of any person engaged in business as a producer, importer, bottler, packer, wholesaler, retailer, or warehouseman, of malt beverages, nor to the use by any person of a trade or brand name that is the name of any living individual of public prominence, or existing private or public organization, provided such trade or brand name was used by him or his predecessors in interest prior to August 29, 1935.

(b) *Simulation of Government stamps.* No label shall be of such design as to resemble or simulate a stamp of the United States Government or of any State or foreign government. No label, other than stamps authorized or required by the United States Government or any State or foreign government, shall state or indicate that the malt beverage contained in the labeled container is brewed, made, bottled, packed, labeled, or sold under, or in accordance with, any municipal, State, Federal, or foreign government authorization, law, or regulation, unless such statement is required or specifically authorized by Federal, State, or municipal, law or regulation, or is required or specifically authorized by the laws or regulations of the foreign country in which such malt beverages were produced. If the municipal or State government permit number is stated upon a label, it shall not be accompanied by an additional statement relating thereto, unless required by State law.

(c) *Use of word "bonded", etc.* The words "bonded", "bottled in bond", "aged in bond", "bonded age", "bottled under customs supervision", or phrases containing these or synonymous terms which imply governmental supervision over production, bottling, or packing, shall not be used on any label for malt beverages.

(d) *Flags, seals, coats of arms, crests, and other insignia.* Labels shall not contain, in the brand name or otherwise, any statement, design, device, or pictorial representation which the Director finds relates to, or is capable of being construed as relating to, the armed forces of the United States, or the American flag, or any emblem, seal, insignia, or decoration associated with such flag or armed forces; nor shall any label contain any statement, design, device, or pictorial representation of or concerning any flag, seal, coat of arms, crest or other insignia,

likely to mislead the consumer to believe that the product has been endorsed, made, or used by, or produced for, or under the supervision of, or in accordance with the specifications of the government, organization, family, or individual with whom such flag, seal, coat of arms, crest, or insignia is associated.

(e) *Curative and therapeutic claims.* Labels shall not contain any statement, design, representation, pictorial representation, or device representing that the use of malt beverage has curative or therapeutic effects if such statement is untrue in any particular or tends to create a misleading impression.

(f) *Use of words "strong", "full strength", and similar words.* Labels shall not contain the words "strong", "full strength", "extra strength", "high test", "high proof", "pre-war strength", "full oldtime alcoholic strength", or similar words or statements, likely to be considered as statements of alcoholic content, except where required by State law. This does not preclude use of the terms "low alcohol," "reduced alcohol," "non-alcoholic," and "alcohol-free," in accordance with § 7.26 (b), (c), and (d).

(g) *Use of numerals.* Labels shall not contain any statements, designs, or devices whether in the form of numerals, letters, characters, figures, or otherwise, which are likely to be considered as statements of alcoholic content, unless required by State law.

(h) *Coverings, cartons, or cases.* Individual coverings, cartons, cases, or other wrappers of containers of malt beverages, used for sale at retail, or any written, printed, graphic, or other matter accompanying the container shall not contain any statement or any graphic pictorial, or emblematic representation, or other matter, which is prohibited from appearing on any label or container of malt beverages.

* * * * *

§ 7.54 Prohibited statements.

(a) *General prohibition.* An advertisement of malt beverages shall not contain:

(1) Any statement that is false or untrue in any material particular, or that, irrespective of falsity, directly, or by ambiguity, omission, or inference, or by the addition of irrelevant, scientific or technical matter, tends to create a misleading impression.

(2) Any statement that is disparaging of a competitor's products.

(3) Any statement, design, device, or representation which is obscene or indecent.

(4) Any statement, design, device, or representation of or relating to analyses, standards, or tests, irrespective of falsity, which the Director finds to be likely to mislead the consumer.

(5) Any statement, design, device, or representation of or relating to any guarantee, irrespective of falsity, which the Director finds to be likely to mislead the consumer. Money-back guarantees are not prohibited.

(6) Any statement that the malt beverages are brewed, made, bottled, packed, labeled, or sold under, or in accordance with, any municipal, State, or Federal authorization, law, or regulation; and if a municipal or State permit number is stated, the permit number shall not be accompanied by any additional statement relating thereto.

(7) The words "bonded", "bottled in bond", "aged in bond", "bonded age", "bottled under customs supervision", or phrases containing these or synonymous terms which imply governmental supervision over production, bottling, or packing.

(b) *Statements inconsistent with labeling.* (1) Advertisements shall not contain any statement concerning a brand or lot of malt beverages that is inconsistent with any

statement on the labeling thereof.

(2) Any label depicted on a bottle in an advertisement shall be a reproduction of an approved label.

(c) *Alcohol content.* Advertisements shall not contain the words "strong," "full strength," "extra strength," "high test," 'high proof," "full alcohol strength," or any other statement of alcohol content, or any statement of the percentage and quantity of the original extract, or any numerals, letters, characters, or figures, or similar words or statements, likely to be considered as statements of alcohol content, except where required by State law. This does not preclude use of the terms "low alcohol," "reduced alcohol," "non-alcoholic," and "alcohol-free," as used on labels, in accordance with § 7.26 (b), (c), and (d).

(d) *Class.* (1) No product containing less than one-half of 1 per centum of alcohol by volume shall be designated in any advertisement as "beer", "lager beer", "lager", "ale", "porter", or "stout", or by any other class or type designation commonly applied to fermented malt beverages containing one-half of 1 per centum or more of alcohol by volume.

(2) No product other than a malt beverage fermented at a comparatively high temperature, possessing the characteristics generally attributed to "ale," "porter," or "stout" and produced without the use of coloring or flavoring materials (other than those recognized in standard brewing practices) shall be designated in any advertisement by any of these class designations.

(e) *Curative and therapeutic claims.* Advertisements shall not contain any statement, design, representation, pictorial representation, or device representing that the use of malt beverages has curative or therapeutic effects if such statement is untrue in any particular or tends to create a misleading impression.

(f) *Confusion of brands.* Two or more different brands or lots of malt beverages shall not be advertised in one advertisement (or in two or more advertisements in one issue of a periodical or a newspaper or in one piece of other written, printed, or graphic matter) if the advertisement tends to create the impression that representations made as to one brand or lot apply to the other or others, and if as to such latter the representations contravene any provision of §§ 7.50 through 7.54 or are in any respect untrue.

(g) *Flags, seals, coats of arms, crests, and other insignia.* No advertisement shall contain any statement, design, device, or pictorial representation of or relating to, or capable of being construed as relating to the armed forces of the United States, or of the American flag, or of any emblem, seal, insignia, or decoration associated with such flag or armed forces; nor shall any advertisement contain any statement, device, design, or pictorial representation of or concerning any flag, seal, coat of arms, crest, or other insignia, likely to mislead the consumer to believe that the product has been endorsed, made, or used by, or produced for, or under the supervision of, or in accordance with the specifications of the government, organization, family, or individual with whom such flag, seal, coat of arms, crest, or insignia is associated.

(h) *Deceptive advertising techniques.* Subliminal or similar techniques are prohibited. "Subliminal or similar techniques," as used in this part, refers to any device or technique that is used to convey, or attempts to convey, a message to a person by means of images or sounds of a very brief nature that cannot be perceived at a normal level of awareness.

APPENDIX H

[SEAL]

DEPARTMENT OF THE TREASURY
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS
WASHINGTON, D.C. 20226

[MAY 04, 1987]

C:I:P:VJR
5130

Adolph Coors Company
Golden, CO 80401

Gentlemen:

We have reviewed your letter dated April 15, 1987, submitting two applications for label approval, as well as print and broadcast advertisements. All of these items contain reference to the alcohol content of the beer and you asked that we approve them unconditionally for use in all market areas.

Pursuant to existing law, 27 U.S.C. 205(e)(2) prohibits statements of alcoholic content on labels of malt beverages unless required by state law. Further, section 205(f)(2) prohibits statements in advertising of alcoholic content of malt beverages in states which prohibit such statements by similar law.

We have reviewed your proposed labels and advertising copy, all of which contain statements of specific alcoholic content, e.g., your proposed Coors beer label which states "contains 4.6% alcohol by volume." In view of the specific wording of the statute, we are unable to approve your Applications for Certificates of Label Approval unless such labels are used in states where statements of specific alcoholic content are required. Furthermore, in view of the

specific wording of section 205(f)(2), we are unable to approve the statements of specific alcoholic content in your advertising copy for states which have laws similar to section 205(f)(2).

You may consider our letter to be ATF's final agency action on this issue. We understand your desire to utilize the unqualified reference to alcohol content on malt beverage labels and advertising material, but ATF is charged with the responsibility for administering the statutory provisions of the Federal Alcohol Administration Act as they are written.

/s/ B. Weininger

BRUCE L. WEININGER
Chief, Industry Compliance Division

Enclosures